Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

BRONX LEGAL SERVICES
and QUEENS LEGAL SERVICES,

Petitioners,

v.

LEGAL SERVICES CORPORATION
LEGAL SERVICES FOR NEW YORK CITY, and
LEONARD KOCZUR, Acting Inspector General
Of the Legal Services Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Legal Services Corporation Act, 42 U.S.C. §§ 2996, *et seq.* ("the LSC Act"), including its related appropriation acts, requires recipients of LSC funds to disclose, as a condition of receiving federal funding, information that is protected from disclosure as "client secrets" under state law and attorney ethical and disciplinary rules?

2. If the LSC Act does require recipients of LSC funds to disclose client secrets, is such requirement constitutional?

3. Whether Section 104 of the Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515 (Oct. 18, 1988) (codified as 5 U.S.C. App. 3 § 8G), which established "Inspector Generals" for certain "designated Federal entities" including the Legal Services Corporation ("LSC"), is constitutionally invalid because it provides for the appointment of such inspector generals in a manner that is not permitted by the Appointments Clause of the Constitution?

STATEMENT PURSUANT TO RULE 29.6

Petitioners Bronx Legal Services and Queens Legal Services Corp. are not-profit corporations. They do not have any parent corporations or any public stock.

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OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit (which affirmed a decision of the District Court for the Southern District of New York granting summary judgment in favor of defendants) was based on an unpublished opinion (Appendix A) reported in 64 Fed. Appx. 310 (2d Cir. 2003). The decision of the District Court (Appendix B) was not officially reported.

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the Court of Appeals was entered on May 22, 2003.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The text of the following relevant constitutional provisions, statutes, and rules are set forth in Appendix C: Article II, Section 2, Clause 2 of the U.S. Constitution; 42 U.S.C. § 2996e(b)(3); 42 U.S.C. §§ 2996f(a)(1) and (10); 42 U.S.C. § 2996(6); Section 509(h) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-59 (April 26, 1996); Section 104 of the Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515 (Oct. 18, 1988) (codified as amended at 5 U.S.C. App. 3 § 8G); Rule 1200.19 of the attorney disciplinary rules of the Appellate Division of the New York State Supreme Court (22 NYCRR § 1200.19); Rule 1200.26(b) of the attorney disciplinary rules of the Appellate Division of the New York State Supreme Court (22 NYCRR § 1200.26).

STATEMENT OF THE CASE

This case presents for review two important questions of statutory interpretation and constitutional law: *first*, whether attorneys who receive federal funding to represent indigent clients pursuant to the LSC Act are required to disclose "client secrets" as a condition of receiving such funds and, *second*, whether Section 104 of the Inspector General Act Amendments of 1988 — which established "inspector generals" for LSC and approximately thirty other

"designated federal entities" — violates the Appointments Clause of the Constitution.[1]

Petitioners Bronx Legal Services ("BLS") and Queens Legal Services Corp. ("QLS") are non-profit corporations that provide free legal assistance in civil matters to indigent persons in Bronx and Queens Counties, New York, respectively. For more than 25 years, BLS and QLS have received funding for such services from defendant Legal Services for New York City ("LSNY") pursuant to the terms of written contracts with LSNY. LSNY, in turn, receives a significant portion of its funding from defendant LSC pursuant to the provisions of the LSC Act.

On January 11, 2000, the Inspector General of LSC ("the IG-LSC") notified LSNY and certain other LSC grant recipients that he intended to perform an "assessment" (audit) of the accuracy of the 1999 case statistics reported to LSC by grantees.[2] The procedure

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1. In addition to LSC, Congress has denominated the following as "designated federal entities" for purposes of the Inspector General Act: the Securities and Exchange Commission, the Federal Communications Commission, the Federal Trade Commission, the Federal Maritime Commission, the Commodities Futures Trading Commission, the Consumer Product Safety Commission, the Equal Opportunity Employment Commission, the National Labor Relations Board, the Federal Labor Relations Authority, the Federal Election Commission, the National Archives and Records Administration, the Federal Reserve System, the Federal Housing Finance Board, the Farm Credit Administration, the National Credit Union Administration, the U.S. International Trade Commission, Amtrak, the Appalachian Regional Commission, the Corporation for Public Broadcasting, the Denali Commission, the National Endowment for the Arts, the National Endowment for the Humanities, the National Science Foundation, the Peace Corps, the Pension Benefit Guaranty Corporation, the Smithsonian Institution, and the United States Postal Service. *See* Office of Management and Budget, "2002 List of Designated Federal Entities," 67 Fed. Reg. 46218 (July 12, 2002).

2. Not all of LSC's grantees were required to submit the information requested by the IG. The audit program contemplated that thirty grantees would be "randomly" selected to participate in Data Call

(Cont'd)

for performing the audit involved two separate "data calls." The first data call ("Data Call 1") required grant recipients to disclose, for each matter closed during 1999, the case number, date opened, problem code, closure code, case handler, office code and subrecipient number (if applicable). The second data call ("Data Call 2") required identification of the case numbers, client names, date closed, office code and subrecipient number (if applicable).[3]

On March 2, 2000, LSNY was notified by the IG-LSC that it had been selected to participate in Data Call 1, and on March 6, 2000, LSNY was notified that it had also been selected to participate in Data Call 2. LSNY promptly provided the IG-LSC with all of the information requested in Data Call 1 in the precise form requested, including the case file numbers and associated problem codes. This included information that had been provided to LSNY by petitioners for matters that were handled by BLS and QLS.[4]

(Cont'd)

1 and that sixty would be "randomly" selected to participate in Data Call 2. The sample was not actually random, however, since the selection process was "weighted" so that "the probability of selecting any given grantee was proportional to the number of closed cases reported by that grantee in 1998." As explained by the IG, "this approach maximized the random selection of larger programs, on average, and minimized the random selection of smaller programs."

3. The "case numbers" referred to in these data calls are not court cases but internal matter identification numbers used by LSC grantees and subrecipients for record-keeping purposes.

4. LSNY does not itself provide legal services on behalf of most of the low income clients in New York City, but rather contracts with other legal service organizations (including BLS and QLS) to perform such services. Thus, most of the client data that LSC had requested from LSNY was not available in files belonging to LSNY but had to be obtained from the files of other legal service organizations, including BLS and QLS. Pursuant to the provisions of the contracts between LSNY and BLS and QLS, LSNY requested that BLS and QLS provide LSNY with all of the information that had been requested by LSC in Data Call 1 and such information was provided. LSNY also requested that BLS and QLS provide LSNY with all of the information required

(Cont'd)

Shortly thereafter, LSNY informed the IG-LSC that it could not comply with Data Call 2 in the precise format requested because disclosure of client names together with the associated problem codes would violate disciplinary and ethical rules that prohibit attorneys from disclosing client secrets and confidences, including 22 NYCRR §§ 1200.19 and 1200.26 and D.R. 4-101 and D.R. 5-107(b) of the New York Lawyers Code of Professional Responsibility.[5] LSNY

(Cont'd)

by LSNY to comply with its alternate proposal for compliance with Data Call 2 (*i.e.*, using unique client identifiers in place of actual client names) and such information was provided.

5. 22 NYCRR § 1200.19 and D.R. 4-101 of the New York Lawyers Code of Professional Responsibility provide as follows: "Except when permitted under section 1200.19(c) of this Part, ***a lawyer shall not knowingly . . . reveal a confidence or secret of a client*** . . ." (emphasis added). Section 1200.19(c) (and D.R. 4-101(c)) provide that "[a] lawyer may reveal . . . [c]onfidences or secrets when permitted under [these] disciplinary rules or ***required by law*** or ***court order***" (emphasis added). "Confidences" and "secrets" are defined in § 1200.19(a) (and in D.R. 4-101(a) as follows: "***Confidence*** refers to information protected by the attorney-client privilege under applicable law, and ***secret*** refers to ***other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client***" (emphasis added). In addition to § 1200.19, 22 NYCRR § 1200.26 (and D.R. 5-107 of the Code of Professional Responsibility) provide as follows:

> Unless authorized by law, a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services, ***or to cause the lawyer to compromise the lawyer's duty to maintain the confidences and secrets of the client*** under section 1200.19(b) of this Part.

22 NYCRR § 1200.26(b) (emphasis added). *See also*, ABA Model Rules of Professional Conduct R 1.6 (2001); D.R. 4-101 of the former ABA Code of Professional Responsibility (replaced in 1983 by the ABA Model Rules).

(Cont'd)

suggested an alternate method of disclosure (use of unique client identifiers in place of actual client names) that would permit the IG-LSC to obtain all of the information he needed to perform the audit without requiring LSNY and its subrecipients (including BLS and QLS) to violate client secrecy.

The IG-LSC refused to accept LSNY's proposal and insisted that LSNY (and BLS and QLS) provide actual client names and problem codes. Thereafter, on or about March 22, 2000, the IG-LSC served LSNY with an administrative subpoena requiring LSNY to provide actual client names along with the associated problem codes. LSNY objected to the subpoena on the ground that it required disclosure of confidential client information. However, the IG-LSC took the position that "a particular state's ethical rules are not relevant to the determination of whether the OIG may obtain access to records" and continued to insist on receiving actual client names together with the associated problem codes.

Thereafter, on April 25, 2000, the IG-LSC filed a petition for enforcement of the subpoena against LSNY in the U.S. District Court for the District of Columbia.[6] BLS and QLS were not served with subpoenas by the IG-LSC, nor were they named as respondents in the subpoena enforcement proceeding brought against LSNY. However, since LSC threatened to terminate BLS's and QLS's funding if they refused to provide the information that had been requested by the IG-LSC, on May 4, 2000, BLS and QLS commenced the present action against LSC, LSNY and the IG-LSC for injunctive and declaratory relief in the U.S. District Court for the Southern District of New York.

(Cont'd)

In considering whether they could comply with the IG's request for disclosure of client names and associated problem codes, LSNY, BLS and QLS requested advice from three noted experts in the field of legal ethics and professional responsibility; all three concluded that it would be a violation of the Code of Professional Responsibility for LSNY and its contractors to comply with the IG's request.

6. This subpoena was enforced in *United States* v. *Legal Services for New York City*, 100 F. Supp. 2d 42 (D. D.C. 2000), *aff'd*, 249 F.3d 1077 (D.C. Cir. 2001).

Defendants thereafter moved for summary judgment dismissing the complaint on the ground that LSC grant recipients are required by Section 509(h) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 ("the 1996 Appropriations Act") to disclose the information that had been requested by the IG-LSC. BLS and QLS opposed the summary judgment motion on numerous grounds, including that neither the LSC Act nor Section 509(h) of the Appropriations Act required disclosure of client secrets.

BLS and QLS further contended that, to the extent that Section 509(h) can or must be interpreted as requiring LSC-funded attorneys to disclose client secrets as a condition of receiving federal funds, such a requirement would be unconstitutional. This was based on three grounds. First, since the regulation of attorneys is a judicial function, if Section 509(h) were interpreted to require attorneys to disclose client secrets, this would unduly interfere with the exercise of judicial power and thus violate the separation of powers principle. Second, requiring legal service organizations such as BLS and QLS to disclose the identity and secrets of their clients violates their First and Sixth Amendment rights. Third, depriving indigent clients, as a condition of receiving LSC-funded legal services, of their right to attorney-client secrecy, violates due process and equal protection.

Finally, BLS and QLS also contended that the Inspector General Act Amendments of 1988 was unconstitutional, and therefore the IG-LSC did not have the power to demand that BLS and QLS provide the information requested.[7]

On August 8, 2002, the District Court issued a memorandum decision granting defendants' motions for summary judgment. The District Court rejected all of the arguments advanced by BLS and QLS and ruled that petitioners were obligated to provide the information requested by the IG-LSC pursuant to Section 509(h) of the 1996 Appropriations Act (App. B). This decision was affirmed by the Court of Appeals for the Second Circuit in an unpublished "summary order" dated May 22, 2003 (App. A).

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7. BLS and QLS also contended that disputed factual issues existed which precluded the District Court from granting summary judgment in favor of defendants.

The courts below ruled that BLS and QLS were obligated to disclose the client secrets at issue here because such disclosure was "required by law" pursuant to Section 509(h) and thus came within the exception to Section 1200.19(c) which permits attorneys to disclose client secrets when required by law.[8] As a result of this decision, BLS and QLS — as well as all other legal service providers who accept LSC funds — are now required to disclose information that constitutes "client secrets" that is otherwise protected from disclosure by state law and/or by attorney ethical and disciplinary rules.

The decision of the courts below was based on an erroneous interpretation of the applicable statutes and one that is clearly contrary to Congress' intent and purpose in enacting the LSC Act. Furthermore, to the extent that the LSC Act can or must be interpreted as requiring such disclosure as a condition of receiving federal funds, it violates several provisions of the Constitution, including due process, equal protection, the First and Sixth Amendments, and the principle of separation of powers. Moreover, even if Section 509(h) were found to be constitutional, it was still improper for the IG-LSC to require disclosure of the client secrets at issue because the statute establishing the office of IG-LSC (Section 104 of the Inspector General Act Amendments of 1988) violates the Appointments Clause of the Constitution.

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8. The District Court indicated in its memorandum decision that there may be a question concerning whether the information at issue actually constituted "client secrets" within the meaning of Section 1200.19 (*see* App. B at 10a). The Court did not rule on this issue, however, and assumed that the information at issue constituted client secrets for purposes of deciding defendants' motions for summary judgment (*see* App. B at 11a). Accordingly, it should be assumed for purposes of this petition that the information at issue constituted client secrets within the meaning of § 1200.19 and D.R. 4-101.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CONFLICT IN FEDERAL STATUTORY LAW REGARDING WHETHER LEGAL SERVICE PROVIDERS ARE OBLIGATED TO MAKE THE DISCLOSURES AT ISSUE HERE

Contrary to the decision of the courts below, there is nothing in the LSC Act that requires recipients of LSC funds to disclose their clients' secrets as a condition of receiving funds. Indeed, the statute explicitly provides that the ethical obligations and professional responsibilities of attorneys shall ***not*** be impeded or impaired. Thus, Section 2996e(b)(3) of the Act provides:

> The Corporation [LSC] shall not, under any provision of this subchapter ***interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association . . . or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce standards of professional responsibility generally applicable to attorneys in such jurisdiction.*** The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities. 42 U.S.C. § 2996e(b)(3) (emphasis added).

Furthermore, Section 2996f expressly requires LSC, in awarding and administering grants and contracts, to "insure the maintenance of the highest quality of service ***and professional standards*** [and] the preservation of attorney client relationships" (42 U.S.C. § 2996f(a)(1)) and to "***insure that all attorneys***, while engaged in legal assistance activities supported in whole or in part by the Corporation, ***refrain from . . . any . . . activity prohibited by the Canons of Ethics and Code of Professional Responsibility*** of the American Bar Association . . ." 42 U.S.C. § 2996f(a)(10) (emphasis added).

Congress, in setting forth its findings and declaration of purpose for the LSC Act, explicitly declared that ***"attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession."*** 42 U.S.C. § 2996(6) (emphasis added). There is no reasonable basis for concluding, therefore, that disclosure of client secrets was intended or required by the LSC Act.

In granting summary judgment in favor of defendants, the District Court ruled (and the Court of Appeals affirmed) that disclosure of the information at issue was mandated by Section 509(h) of the 1996 Appropriations Act. This was an erroneous and improper interpretation of Section 509(h).[9]

First, Section 509(h) only requires disclosure of "financial records, time records, retainer agreements, client trust fund and eligibility records, ***and client names***" (emphasis added). It does not require disclosure of client names ***together with associated problem codes***, which is what the IG-LSC demanded here. Based on the plain wording of the statute, therefore, the interpretation of the courts below that Section 509(h) required disclosure of client names together with associated problem codes was unfounded and unwarranted. This is particularly true in light of the explicit provisions of the LSC Act that were designed to allow LSC-funded attorneys to comply with their professional ethical obligations. It was thus

9. In reaching their decisions regarding the effect of Section 509(h), both the District Court and the Court of Appeals were strongly influenced by the prior decision of the D.C. courts in the subpoena enforcement proceeding, which also ruled that Section 509(h) required disclosure of the information at issue. The facts in that proceeding were completely different, however, since LSNY ***had been served with a subpoena*** and the only question was whether the subpoena should be enforced. In the present case, in contrast, BLS and QLS were never served with a subpoena. Since the only issue in the subpoena enforcement proceeding was whether the subpoena should be enforced, the statements made by the D.C. courts regarding the possible effect of Section 509(h) were merely dicta.

unreasonable for the courts below to conclude that Congress intended, in enacting the 1996 Appropriations Act, to require such attorneys to disclose client secrets.

Second, it is a cardinal principle of statutory construction that "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *J.E.M. AG Supply, Inc.* v. *Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 143-44 (2001). Here, the courts below effectively and incorrectly ruled that Section 509(h) of the Appropriations Act modified or repealed Section 2996e(b)(3) of the LSC Act so as to require BLS and QLS to make the disclosures at issue. That is simply not so.

As noted above, Section 2996e(b)(3) of the LSC Act plainly provides in clear and unequivocal language that "the Corporation [LSC] ***shall not***, under any provision of this subchapter, ***interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility . . .***" 42 U.S.C. § 2996e(b)(3) (emphasis added). Furthermore, Section 2996f expressly requires LSC, in awarding grants and contracts, to "insure the maintenance of the highest quality of service ***and professional standards*** [and] the preservation of attorney client relationships" (42 U.S.C. § 2996f(a)(1)) (emphasis added) and to "***insure that all attorneys***, while engaged in legal assistance activities supported in whole or in part by the Corporation, ***refrain from . . . any . . . activity prohibited by the Canons of Ethics and Code of Professional Responsibility*** of the American Bar Association . . ." 42 U.S.C. § 2996f(a)(10) (emphasis added). Furthermore, in setting forth its findings and declaration of purpose for the LSC Act, Congress explicitly declared that ***"attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession."*** 42 U.S.C. § 2996(6) (emphasis added).

In light of these plain and explicit statutory provisions, it is indisputable that Congress intended, in enacting the LSC Act: (i) to require that all attorneys who receive funding under the LSC Act abide by the ethical standards of the legal profession (including the prohibition against disclosure of client secrets); and (ii) to prohibit LSC from doing anything that would impede or interfere with an attorney's ability to abide by these ethical standards.

An important question for this Court to decide, therefore, is whether the clear provisions of the LSC Act which require attorneys to comply with professional ethical obligations and which prohibit LSC from interfering with an attorney's ability to abide by these ethical obligations were modified or repealed by Section 509(h) of the 1996 Appropriations Act. Analysis of the two statutes clearly indicates that the LSC Act was not modified or repealed by the Appropriations Act, and thus that Section 509(h) does not have the effect ascribed to it by the courts below.

First, there is nothing inherently inconsistent between Sections 2996e(b)(3), 2996f(a)(1) and 2996(6) of the LSC Act and Section 509(h) of the Appropriations Act, and thus there is no reason to believe that Congress intended to modify or repeal the former when it enacted the latter. Section 2996e(b)(3) explicitly prohibits the LSC from ***doing anything*** that would ***interfere with*** an attorney's ethical obligations, including, of course, interfering with an attorney's ethical obligation to maintain client secrets. Section 509(h), on the other hand, merely requires that "financial records, time records, retainer agreements, client trust fund and eligibility records, and client names . . . be made available to any auditor or monitor of the recipient." There is nothing in Section 509(h) that explicitly requires recipients of LSC funds to disclose ***client secrets***, and thus the two statutes are not inherently inconsistent. As this Court ruled in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), "[o]nly a clear repugnancy between the old and the new [law] results in the former giving way . . ." *Id.* at 190 (quoting from *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 456-57 (1945).

Second, even if it is assumed that Section 2996e(b)(3) and Section 509(h) are inconsistent, it is unreasonable to believe that

Congress intended to change the substantive law of the LSC Act when it enacted the 1996 Appropriations Act. It is well established that "repeals by implication are not favored." *Tennessee Valley*, 437 U.S. at 189. "This is especially true when the provision advanced as the repealing measure . . . was enacted in an appropriations bill." *Auburn Housing Authority* v. *Martinez*, 277 F.3d 138, 144 (2d Cir. 2002).

Section 509(h) comprises a mere ten ***lines*** of text in an appropriations act that is ***382 pages*** long (see 110 Stat. 1321 to 1321-381). The statute was enacted after "a historic budget confrontation" (142 *Cong. Rec.* H4046-01, H4047) (March 7, 1996) (remarks of Rep. Drier) in which, "for more than 7 months, this House held most of the departments and agencies of this Government in a state of suspended animation" (*Id.* at H4083) (remarks of Rep. Obey). There was no discussion in either the House or the Senate regarding the purpose or effect of Section 509(h),[10] and there is no reason to infer that Congress intended to repeal the clear prohibition of Section 2996e(b)(3).[11]

10. Pursuant to H. Res. 372, "general debate" in the House on the entire appropriations bill was "confined to the bill and shall not exceed one hour divided equally and controlled by the chairman and ranking minority member of the Committee on Appropriations." 142 *Cong. Rec.* H1793 (March 7, 1996). As noted by Representative Jackson-Lee in opposing H.R. 372, "[t]he Members of the House have not had sufficient time to review this bill. It is too important and affects too many Americans for us to give it only a cursory review." 142 *Cong. Rec.* H1798 (March 7, 1996).

11. The most extensive discussion regarding LSC occurred in the Senate on September 29, 1995, with respect to H.R. 2076 (a predecessor bill to H.R. 3019 which was vetoed by President Clinton). The Senate version of H.R. 2076 had proposed to eliminate all funding to LSC and replace it with "block funding" to the states for legal services. On September 29 the Senate debated an amendment to H.R. 2076 (referred to as the "Domenici Amendment") which restored funding to LSC but with numerous restrictions (as already included in the House version of the bill). Almost all of the debate that occurred in the Senate focused on whether LSC should be funded at all, not on any of the

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In considering what effect, if any, should be given to a legislative restriction contained in an appropriation act, this Court's decision in *Tennessee Valley* is particularly relevant and instructive. In that case, Congress had enacted certain environmental restrictions as part of the Endangered Species Act of 1973, the effect of which would have prevented TVA from completing and operating the nearly-completed Tellico Dam project. Meanwhile, Congress continued to appropriate funds to complete the dam. After conducting extensive hearings at which the possible application of the Endangered Species Act was explicitly discussed as a potential problem, the Senate Appropriations Committee reported that "[t]he Committee does not view the Endangered Species Act as prohibiting the completion of the Tellico project at its advanced stage ***and directs that this project be completed as promptly as possible in the public interest.***" S. Rep. No. 94-960, at 96 (quoted at 437 U.S. at 167) (emphasis added). Similarly, the House Appropriations Committee also reported that "[t]he Committee directs that the project, for which an environmental impact statement has been completed and provided to the Committee, ***should be completed as promptly as possible***." H.R. Rep. No. 94-319, at 76 (quoted at 437 U.S. at 164) (emphasis added). Thereafter, a lawsuit was brought to enjoin

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proposed restrictions. See 141 *Cong. Rec.* S14573-02, S14588 to S14609 (Sept. 29, 1995). Similarly, when H.R. 3019 and S. 1594 (the revised House and Senate versions of the Appropriations Bill that eventually became Public Law 104-134 (*i.e.*, the Omnibus Appropriations Act) and H. Res. 415 (the House resolution authorizing consideration of the Conference version of H.R. 3019) were debated, there was no discussion of the restriction that eventually became Section 509(h). See 142 *Cong. Rec.* H1808-04, H1808, H1891-1894 (March 7, 1996); 142 *Cong. Rec.* H4046-01, H4046-4101 (April 25, 1996) (debate on H. Res. 415); 142 *Cong. Rec.* S1668-05, S1669-S1670 (March 11, 1996); 142 *Cong. Rec.* S1933-01, S1963 (March 13, 1996); 142 *Cong. Rec.* S2038-01, S2055-S2056, S2060-2062 (March 14, 1996) (discussion of Cohen-Bumpers Amendment "to permit recipients of Legal Services Corporation grants to use funds derived from non-Federal sources to testify at legislative hearings"); 142 *Cong. Rec.* S2441-03, S2454-S2457 (March 20, 1996).

further construction of the dam, and this Court ultimately ruled that the Endangered Species Act was applicable and prohibited completion of the dam.

In reaching this decision, the Court looked first to the language of the Endangered Species Act and concluded that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer. . . . This language admits of no exception." 437 U.S. at 173. The Court then looked to the language of the appropriation act to determine whether Congress intended to repeal the provision of the Endangered Species Act at issue.

The Court first noted that the appropriations at issue "represented relatively minor components of the lump-sum amounts for the ***entire*** TVA budget." *Id.* at 189 (emphasis in original). The Court next noted that "repeals by implication are not favored" (quoting *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974)), that "the intention of the legislature to repeal must be clear and manifest" (quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)), and that "this policy applies with even greater force when the claimed repeal rests solely on an Appropriations Act." *Id.* at 190. The Court then explained that the Standing Rules of both houses of Congress prohibit provisions in, or amendments to, appropriations bills that change existing law (*Id.* at 190-91, citing House Rule XXI(2) and Senate Rule 16.4),[12] and noted the incongruity of inferring a repeal of legislation "by means of a procedure expressly prohibited under the rules of Congress." *Id.* at 191.

With respect to the clear and unequivocal statements that had been made by both the House and the Senate Appropriations Committees that the Tellico Dam project should be "promptly" completed notwithstanding the Endangered Species Act, this Court stated, first, that such "expressions of committees dealing with

12. These "standing rules" have been in effect since the middle of the nineteenth century. The House Rules were revised and recodified in 1999, but the prohibition against legislation in appropriations acts remained essentially the same. See House Rule XXI(2)(b) and (c). The current House Rules can be found at *www.house.gov/rules* and the current Senate Rules can be found at *www.senate.gov/*.

requests for appropriations cannot be equated with statutes enacted by Congress" (*Id.* at 191) and, second, "there is no indication that Congress ***as a whole*** was aware" of the Committee's position (*Id.* at 192) (emphasis added). In this regard, the Court noted that "[o]nly recently in *SEC* v. *Sloan*, 436 U.S. 103 (1978), we declined to presume general congressional acquiescence in a 34-year-old practice of the Securities and Exchange Commission, despite the fact that the Senate Committee having jurisdiction over the Commission's activities had long expressed approval of the practice." *Id.* at 192. Finally, the Court concluded that the statements made by the House and Senate Appropriations Committee members "'represent only the personal views of these legislators' and 'however explicit, [they] cannot serve to change the legislative intent of Congress expressed before the Act's passage.'" *Id.* at 193.

Similarly here, as in *Tennessee Valley*, there is absolutely no reason to believe that Congress, by enacting the 1996 Appropriations Act, intended to modify or repeal the specific requirement in Section 2996e(b)(3) of the LSC Act that "[t]he Corporation shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility . . ." 42 U.S.C. § 2996e(b)(3).

Accordingly, the conclusion reached by the courts below that Section 509(h) of the 1996 Appropriations Act requires recipients of federal funds under the LSC Act to disclose their clients' secrets is clearly erroneous and should be reversed.

II. AS INTERPRETED AND APPLIED BY THE COURTS BELOW SECTION 509(h) OF THE 1996 APPROPRIATIONS ACT IS UNCONSTITUTIONAL

It is well-established that "[f]ederal statutes are to be construed so as to avoid serious doubt of their constitutionality." *International Assoc. of Machinists* v. *Street*, 367 U.S. 740, 749 (1961). As explained in *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932), "[w]hen the validity of an act of the Congress is drawn in question . . . it is a cardinal principle that [courts] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

In accordance with this salutary principle, petitioners submit, for the reasons explained above, that it is "fairly possible" and "entirely reasonable" to interpret Section 509(h) so as not to require disclosure of client secrets. However, to the extent Section 509(h) must be construed to require LSC-funded attorneys to disclose client secrets as a condition of receiving funds, then it is unconstitutional. This is so for several reasons.

First, under the separation of powers principle, "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving* v. *United States*, 517 U.S. 748, 757 (1996). The regulation of attorneys is essentially a judicial function and therefore Section 509(h), if so interpreted, would violate the separation of powers principle. *See Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 545-46 (2001), stating that "[a]n informed, independent judiciary presumes an informed, independent bar" and holding that "[t]he restriction imposed by the statute here threatens severe impairment of the judicial function." Similarly here, as in *Velazquez*, "courts and the public would come to question the adequacy and fairness of professional representations when the attorney, either consciously to comply with this statute or unconsciously to continue the representation despite the statute" agreed to violate his ethical obligations to his clients. 531 U.S. at 546.

It is spurious and illogical to say that attorneys have an ethical obligation to preserve client secrets and then say that it is permissible for LSC-funded attorneys (and only LSC-funded attorneys) to disclose their clients' secrets because Congress says they may do so. In effect, Congress would be saying that an ethical obligation that applies to all attorneys generally does not apply to attorneys who receive LSC funds. This creates two classes of attorneys and unduly infringes on the prerogative of the judiciary to regulate attorneys.

Second, to the extent that Section 509(h) is interpreted as requiring legal service organizations such as BLS and QLS to disclose the names of their clients, and indigent clients to disclose their identity,

this runs afoul of the First Amendment and the right to privacy. Case law is clear that every person, even poor people, have a constitutional right of association to consult with an attorney. *See, e.g., Denius* v. *Dunlap*, 209 F.3d 944, 953-54 (7th Cir. 2000) ("[t]he right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association and petition"); *DeLoach* v. *Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) ("[t]he right to retain and consult with an attorney, however, implicates not only the Sixth Amendment but also clearly established First Amendment rights of association and free speech"); *Martin* v. *Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982); *see also United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576, 585-86 (1971); *United Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217, 221-22 (1967).

It is also well established that the government may not compel disclosure of the identity of persons exercising their First Amendment right of association ***unless there is a clearly demonstrated and compelling state need***. *See Baird* v. *State Bar of Arizona*, 401 U.S. 1, 6-7 (1971) ("[w]hen a State seeks to inquire about an individual's . . . associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest"); *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960); *Gibson* v. *Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *NAACP* v. *Alabama*, 357 U.S. 449, 466 (1958).

In the present case, there is simply no compelling need for disclosure of the identity of BLS's and QLS's clients, and thus, to the extent that Section 509(h) purports to require such disclosure, it is unconstitutional.[13]

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13. The District Court rejected this argument on the ground that "there is a sound reason for the defendants' request." *See* App. B at 18a. This conclusion was grossly improper, however, because it ignored substantial evidence that had been presented by petitioners which established that defendants' request was both unnecessary and unreasonable.

Third, to the extent that Section 509(h) is interpreted as requiring LSC-funded attorneys and their indigent clients to disclose client secrets as a condition of receiving federal funds for legal services, it violates both due process and equal protection. Under the "doctrine of unconstitutional conditions," it is a violation of due process for the government to condition the receipt of federal funding on relinquishment of a constitutional right. *See, e.g.*, *Regan* v. *Taxation With Representation*, 461 U.S. 540, 545 (1983) ("the government may not deny a benefit to a person because he exercises a constitutional right"); *Burgess* v. *Lowery*, 201 F.3d 942, 946-47 (7th Cir. 2000); *McKenna* v. *Peekskill Housing Authority*, 647 F.2d 332 (2d Cir. 1981); *Board of Education* v. *Califano*, 584 F.2d 576, 588 n.38 (2d Cir. 1978). Here LSC-funded clients have a First and Sixth Amendment right of association to confer with their attorneys without unreasonable government interference and a constitutional privacy right not to have their secrets unnecessarily disclosed. If, under Section 509(h), such clients are required to disclose their identity and their secrets as a condition of receiving federally-funded legal services, this violates the doctrine of unconstitutional conditions. Furthermore, since the only class of persons required to make such disclosures are those who are indigent, the statute also violates equal protection.

The court below ruled that petitioners' equal protection argument fails because "indigence alone is not a suspect class under equal protection analysis." *See* App. B at 18a. It is, of course, true that financial need alone is usually not a suspect class for equal protection analysis. Thus, in *Maher* v. *Roe*, 432 U.S. 464 (1977), this Court ruled that it was not a denial of equal protection for a state to refuse to fund abortions for indigent women. This was because a woman does not have an "unqualified 'constitutional right to [have] an abortion'" (*Id.* at 473), but merely a right to be free from "unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Id.* at 474. As the Court recognized, "the central question . . . is whether [a] regulation 'impinges upon a

fundamental right explicitly or implicitly protected by the Constitution.'" *Id.* at 471.

The statute at issue here ***does*** "impinge upon a fundamental right explicitly or implicitly protected by the Constitution." Both the First Amendment and the Sixth Amendment protect the right to consult with an attorney ***free from government interference***. It may be that there is presently no clearly established constitutional requirement that the government ***provide*** attorneys to poor people in non-criminal matters, but when the government chooses to provide such attorneys, it must do so without "unduly burdensome interference." *Id.* at 474.

As recognized in *Maher*, there are situations where the Equal Protection Clause ***does require*** that special protection be afforded to indigent persons. Thus, in *Griffin* v. *Illinois*, 351 U.S. 12 (1956) and *Douglas* v. *California*, 372 U.S. 353 (1963), the Court held that "the Equal Protection Clause requires States that allow appellate review of criminal convictions to provide indigent defendants with trial transcripts and appellate counsel." *Maher*, 432 U.S. at 471 n.6. The Court in *Maher* explained that "[t]hese cases are grounded in the criminal justice system, a government monopoly in which participation is compelled." *Id.* These same concerns, however, are also true of the court system generally. Indigent clients faced with eviction proceedings, denial of SSI benefits, and a host of other legal problems have no choice but to participate in the same "government monopoly" that is the judicial system.

III. SECTION 104 OF THE INSPECTOR GENERAL ACT AMENDMENTS OF 1988 IS UNCONSTITUTIONAL

The IG-LSC was established by Section 104 of the Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515 (1988) ("the 1988 Amendments Act") (codified as 5 U.S.C. App. 3 § 8G). Besides LSC, Section 104 also established inspector general offices for 33 other federal agencies and entities which were

denominated by Congress as "designated Federal entities."[14] Pursuant to subparagraph (c) of Section 104 (5 U.S.C. App. 3 § 8G(c)), the inspector generals of these entities (including the IG-LSC) are not appointed by the President by and with the advice and consent of the Senate, but "by the head of the designated Federal entity in accordance with the applicable laws and regulations governing appointments within the designated Federal entity."

Prior to the 1988 Amendments Act, Congress had established inspector general offices in 21 federal agencies and departments, most of which were established pursuant to the provisions of the Inspector General Act of 1978.[15] Furthermore, Section 102 of the 1988 Amendments Act established inspector general offices in certain additional agencies and departments (including the departments of Justice and Treasury). Pursuant to the 1978 Act and Section 102 of the 1988 Amendments Act, the inspector generals of these entities are all appointed by the President by and with the advice and consent of the Senate. *See* 5 U.S.C. App. 3 §§ 2, 3(a) and 11(2).

Congress has thus adopted two different procedures for appointing inspectors general: some are appointed by the President by and with the advice and consent of the Senate, whereas others (including the IG-LSC) are appointed by the "head" of the

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14. Pub. L. No. 100-504, § 104, 102 Stat. 2515, 2523 (Oct. 18, 1988). See footnote 4, *supra*, for the current list of "designated Federal entities."

15. Pub. L. No. 95-452, 92 Stat. 1101 (Oct. 12, 1978). The office of inspector general was first created by Congress in 1976 for the Department of Health, Education and Welfare. Pub. L. No. 94-505, Title III, 90 Stat. 2429 (Oct. 15, 1976), formerly codified as, 42 U.S.C. § 3521 (1976). In 1977, when Congress created the Department of Energy, it also provided for an inspector general in that department. Pub. L. No. 95-91, § 208, 91 Stat. 565, 575 (Aug. 4, 1977), formerly codified as, 42 U.S.C. § 7138 (1977). The following year Congress enacted the Inspector General Act of 1978, which established offices of inspector generals in twelve additional federal departments and agencies. By 1988 the number of inspector generals had been expanded to 21. See H.R. Rep. 100-771, at 5 (1988), *reprinted in*, 1988 U.S. Code Cong. and Adm. News 3154, 3158.

government entity.[16] This is so even though all inspector generals exercise similar powers and duties under the Inspector General Act, including the power to conduct audits and investigations and the power to subpoena documents and information. *See* 5 U.S.C. App. 3 §§ 4, 5, 6, 7 and 8G(g)(1) ("Sections 4, 5, 6 (other than subsections (a)(7) and (a)(8) thereof), and 7 of this Act shall apply to each Inspector General and Office of Inspector General of a designated federal entity. . . ."). Since the inspector general of a designated federal entity (including the IG-LSC) is a "principal officer" of the United States within the meaning of *Edmond* v. *United States*, 520 U.S. 651 (1997); *Ryder* v. *United States*, 515 U.S. 177 (1995), *Weiss* v. *United States*, 510 U.S. 163 (1994) and *Morrison* v. *Olson*, 487 U.S. 654 (1988), this procedure violates Article II, Section 2, Clause 2 of the Constitution, which requires that all principal officers of the United States be appointed by the President by and with the advice and consent of the Senate.

Accordingly, to the extent that Section 104 of the 1988 Amendments Act permits inspector generals of designated federal entities (including the IG-LSC) to be appointed in a manner not permitted by the Appointments Clause, it is unconstitutional.

A. LSC Is A Federal Entity Subject To The Appointments Clause

In determining whether Section 104 of the 1988 Amendments Act is constitutional, it is necessary to examine whether the IG-LSC is a "principal officer" of the United States within the meaning of Article II, Section 2, Clause 2 of the Constitution. This, in turn,

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16. In *National Aeronautics and Space Administration* v. *Federal Labor Relations Authority*, 527 U.S. 229, 238 n.3 (1999), a case involving an IG who had been appointed by the President by and with the advice and consent of the Senate, this Court recognized that two separate procedures had been established for appointing inspector generals. However, the validity of this difference in procedure was not at issue in that case.

requires an analysis of whether LSC is a "government entity" for purposes of applying constitutional restrictions and whether the IG-LSC is an "officer" of the United States.

In enacting the LSC Act, Congress specifically contemplated that LSC would be "a private nonmembership nonprofit corporation." 42 U.S.C. § 2996b(a); *see also* 42 U.S.C. § 2996d(e)(1) ("the Corporation shall not be considered a department, agency, or instrumentality, of the Federal Government"). As this Court made clear in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 392 (1995), however, "it is not for Congress to make the final determination of [an entity's] status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions."

Lebron held that the National Railroad Passenger Corporation ("Amtrak") was a government entity for purposes of applying constitutional limitations even though it was incorporated under the District of Columbia's Business Corporation Act and had private shareholders and even though Congress had explicitly provided that it was not an agency of the United States.[18] In making this determination, the Court looked to the nature of Amtrak to see whether it is "by its very nature, what the Constitution regards as the government":

> If Amtrak is, by its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its [constitutional] restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment. 513 U.S. at 392.

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18. *See* Pub. L. No. 91-518, Title III, § 301, 84 Stat. 1327, 1330 (Oct. 30, 1970), *formerly codified as* 45 U.S.C. § 541, *repealed*, Pub. L. 103-272, § 7(b), 108 Stat. 1379 (July 5, 1994).

The Court then examined the purpose for which Amtrak was formed and the extent of government control over its operations. Based on this analysis, the Court concluded that Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." *Id.* at 394. As the Court explained:

> Amtrak is not merely in the temporary control of the Government (as a private corporation whose stock comes into federal ownership might be); it is established and organized under federal law for the very purpose of pursuing federal government objectives, under the direction and control of federal governmental appointees. It is in that respect no different from the so-called independent regulatory agencies such as the Federal Communications Commission or the Securities Exchange Commission, which are run by Presidential appointees with fixed terms." *Id.* at 398.

LSC clearly satisfies all of the requirements discussed in *Lebron* for determining whether it is a government entity subject to constitutional limitations. It was established and organized by Congress under federal law for the particular purpose of pursuing federal government objectives, it is wholly funded by the federal government, and it is under the direction and control of federal government employees.[19] Accordingly, there can be no question but that LSC, like Amtrak, is a government entity for purposes of constitutional restrictions.

The particular constitutional limitation that was at issue in *Lebron* was the First Amendment: plaintiff alleged it had been denied freedom of speech because Amtrak refused to display an advertisement. The constitutional restriction at issue in the present case is the

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19. LSC is managed by a board of directors consisting of eleven members, all of whom are appointed by the President by and with the advice and consent of the Senate. *See* 42 U.S.C. § 2996c(a).

Appointments Clause: petitioners claim that the 1988 Amendments Act is unconstitutional because it provides for the appointment of inspectors general (including the IG-LSC) in a manner that is not permitted by Article II, Section 2, Clause 2. Although this is a different provision of the Constitution from the one at issue in *Lebron*, that is not a significant difference. The teaching of *Lebron* is that Congress cannot avoid constitutional restrictions by disclaiming that an entity it creates for a governmental purpose is not part of the government. This is true regardless of which provision of the Constitution Congress seeks to evade. As explained in *Edmond*:

> [T]he Appointments Clause of Article II is more than a matter of "etiquette or protocol"; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches. 520 U.S. at 659.

As noted in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), "[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government ***but of the entire Republic***," and "[n]either Congress nor the Executive can agree to waive th[e] structural protection[s]" that the Clause provides. *Id.* at 880 (emphasis added). *See also*, *Weiss*, 510 U.S. at 188-89 (concurring opinion of Justice Souter).

In the present case, Congress violated this principle by establishing inspector generals (including the IG-LSC) who are not appointed in accordance with the Appointments Clause.

B. The IG-LSC Is A "Principal Officer" Of The United States And Must Be Appointed By The President With Advice And Consent Of The Senate

It is clear under *Lebron* that LSC qualifies as a government entity for purposes of applying constitutional restrictions. It is also indisputable that inspector generals in general and the IG-LSC in particular are "officers" of the United States for purposes of complying with the Appointments Clause. *See, e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]"). These two factors alone, however, do not necessarily signify that Section 104 of the 1988 Amendments Act is unconstitutional. A salient question is whether the inspector generals of "designated federal entities" (including the IG-LSC) are "principal officers" who must be appointed by the President by and with the advice and consent of the Senate or "inferior officers" who "the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., Art. II, § 2, cl. 2.

This Court examined the question of "principal" versus "inferior" officer for purposes of the Appointments Clause in *Morrison*, *Weiss*, *Ryder* and *Edmond*. In *Morrison* the Court applied a four part balancing test in holding that independent counsels appointed under the Ethics in Government Act of 1978 were not principal officers. In *Weiss*, the Court held that commissioned officers who served as military judges did not need to be "reappointed" as judges, since they had already been appointed as officers by the President when they received their commissions. The Court noted, however, that "[t]he constitutionality of the provision allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question" which "is not at issue here." 510 U.S. at 170 n.4. In *Ryder* the Court answered the question left open in *Weiss* and ruled that civilian judges on the Court of Military Review (renamed the Court

of Criminal Appeals) had to be appointed pursuant to the Appointments Clause. Finally, in *Edmond* the Court ruled that civilian judges on the Court of Criminal Appeals did not need to be appointed by the President with the advice and consent of the Senate because they were not principal officers of the United States.

The Court in *Edmond* departed from the four-part analysis that had been used in *Morrison* and applied a test based upon supervision and control. In a majority opinion in which eight of the justices joined, the Court stated that "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." 520 U.S. at 663. At a later point in the opinion the Court stated, "[w]hat is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States ***unless permitted to do so by other Executive officers***." *Id.* at 665 (emphasis added).

In a concurring opinion, Justice Souter agreed that "the term 'inferior officer' implies an official superior" and that "one who has no superior is not an inferior officer." 520 U.S. at 667. He then noted, however, that "[i]t does not follow . . . that if one is subject to some supervision and control, one is an inferior officer. Having a superior officer is necessary for inferior officer status, but not sufficient to establish it." *Id.* at 667 (citing and quoting from Justice Scalia's dissenting opinion in *Morrison*, 487 U.S. at 654, 722 ("To be sure, it is not a ***sufficient*** condition for 'inferior' officer status that one be subordinate to a principal officer. Even an officer who is subordinate to a department head can be a principal officer") (emphasis in original).

Applying these principles to the position at issue here, it is clear that the office of inspector general as created by the Inspector General Act of 1978, and as amended by the 1988 Amendments Act, is a "principal officer" of the United States and one that must be appointed by the President by and with the advice and consent of the Senate. This is so for several reasons.

First, Congress itself recognized that inspector generals are principal officers who need to be appointed by the President by and

with the advice and consent of the Senate since it provided for precisely this type of appointment in the original Inspector General Act of 1978 (*see* Pub. L. No. 95-452, § 3(a), 92 Stat. 1101 (Oct. 12, 1978) (codified as 5 U.S.C. App. 3 § 3(a)). It was not until 1988, when Congress decided to "extend" the Inspector General Act to certain "designated Federal entities" such as Amtrak and LSC that Congress provided for non-presidential appointment. *See* Pub. L. No. 100-504, § 104, 102 Stat. 2515, 2522 (Oct. 18, 1988) (codified as 5 U.S.C. App. 3 § 8G(c)). Moreover, even in enacting the 1988 Amendments Act, Congress provided for presidential appointment of the inspector generals that were newly established by Section 102 of that Act (including the inspector generals for the Departments of Justice and Treasury). *See id.*, § 102, 102 Stat. 2515 (codified as 5 U.S.C. App 3 §§ 2, 3(a) and 11(2)). One possible explanation for Congress' failure to provide for presidential appointment of the inspector generals established under Section 104 (including Amtrak and LSC) was its belief that these entities were not government entities subject to the requirements of the Appointments Clause.[20] As explained above, however, *Lebron* makes clear that this is not a valid basis for ignoring constitutional restrictions.

Second, all of the inspector generals perform essentially the same functions and have essentially the same powers.[21] There is no reason to conclude, therefore, that the inspector generals for "federal

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20. Although this explanation makes sense in the case of Amtrak and LSC, it is hard to believe that Congress thought that the SEC and the FTC (which were also included as "designated federal entities" in Section 104) were not government entities subject to the provisions of the Appointments Clause.

21. In enacting the 1988 Amendments Act, Congress explicitly contemplated that the "administratively appointed" inspectors general would have the same powers and duties as those appointed by the President: "The administratively appointed inspectors general would have the same authorities and responsibilities as those provided for in the 1978 act for the Presidentially appointed inspectors general . . ." H.R. Rep 100-771, at 15 (1988), *reprinted in*, 1988 U.S. Code Cong. & Adm. News 3154, 3167.

establishments" (*i.e.*, those appointed by the President under 5 U.S.C. App. 3 § 3(a)) are principal officers, whereas the inspector generals for "designated federal entities" (*i.e.*, those appointed under Section 104 of the 1988 Amendments Act) (5 U.S.C. App. 3 § 8G(c)) are inferior officers. A contrary result would be the equivalent of saying that ambassadors to England, Russia and France are principal officers who need to be appointed by the President, but ambassadors to Bolivia, Kenya and Senegal are inferior officers who can be appointed by the Secretary of State. *See Morrison*, 487 U.S. at 718 (dissenting opinion of Justice Scalia) ("[t]he Ambassador to Luxembourg is not anything less than a principal officer, simply because Luxembourg is small").

Finally, and most importantly, the inspector generals who are appointed under Section 104 (including the IG-LSC) are not "directed and supervised" within the meaning of *Edmond* "by others who were appointed by Presidential nomination with the advice and consent of the Senate." On the contrary, Section 104 explicitly provides that "[t]he head of the designated Federal entity shall *not* prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation." 5 U.S.C. App. 3 § 8G(d) (emphasis added).

Accordingly, for all of the forgoing reasons, Section 104 of the 1988 Amendments Act is unconstitutional for failure to comply with the Appointments Clause of the Constitution. This, in turn, means that the IG-LSC was improperly appointed and had no lawful authority to demand that BLS and QLS provide the information at issue here.

C. Even If The IG-LSC Is Not A "Principal Officer" Of The United States, His Appointment By LSC's Board of Directors Was Still Constitutionally Invalid

As shown above, petitioners submit that the IG-LSC is a "principal officer" of the United States and, therefore, the statute pursuant to which he was appointed is constitutionally invalid because it does not provide for appointment by the President by and with the advice and consent of the Senate. Even if the IG-LSC is merely

an "inferior officer," however, the method by which he was appointed would still be unconstitutional, since he was appointed by LSC's Board of Directors, which is not the "Head of a Department" within the meaning of Art. II, § 2, cl. 2.

The Appointments Clause is very explicit in providing who is authorized to appoint inferior officers, stating that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., Art. II, § 2, cl. 2. Thus, inferior officers may only be appointed: (i) by the President; (ii) by a "court of law"; or (iii) by the "Head" of a "Department." *See Freytag*, 501 U.S. at 883-88; *Buckley*, 424 U.S. at 132.

In the present case, the IG-LCS was appointed by the Board of Directors of LSC pursuant to Section 104(a) of the 1988 Amendments Act (5 U.S.C. App. 3 § 8(G)(c)), which provides that the inspector general of a "designated Federal entity" "shall be appointed by the head of the designated Federal entity. . . ." Section 104(a) (5 U.S.C. App. 3 § 8(G)(a)(3)), in turn, defines "head of the designated Federal entity" to mean "any person or persons designated by statute as the head of a designated Federal entity and if no such designation exists, the chief policymaking officer or board of a designated Federal entity as identified in the list published [by the Director of the Office of Management and Budget] pursuant to subsection (h)(1) [5 U.S.C. App. 3 § 8(G)(h)(1)] of this section . . ." As specified in the list published by the OMB in accordance with section (h)(1), the "head" of LSC is LSC's Board of Directors. *See* Office of Management and Budget, "2002 List of Designated Federal Entities," 67 Fed. Reg. 46218 (July 12, 2002).

This Court examined the meaning of "Head of Department" for purposes of the Appointments Clause in *Freytag* and held (in a portion of the decision in which five justices joined) that the term must be confined ***"to executive divisions like the Cabinet-level departments."*** 501 U.S. at 886 (emphasis added). In addition to finding that this interpretation was required by constitutional policy considerations, the Court concluded that "[s]uch a limiting construction also ensures that we interpret that term in the

Appointments Clause consistently with its interpretation in other constitutional provisions." *Id.* Based on this interpretation, the Court ruled that the U.S. Tax Court was not a "department" for purposes of the Appointments Clause.

For the same reasons as articulated by this Court in *Freytag*, LSC cannot possibly be considered a "department" of the Executive Branch for purposes of the Appointments Clause and, accordingly, the Board of Directors of LSC cannot possibly be considered the "head" of a "department" for purposes of appointing the IG-LSC.[22] It necessarily follows, therefore, that the IG-LSC was not appointed in accordance with the requirements of Art. II, § 2, cl. 2.

Thus, regardless of whether the IG-LSC is deemed to be a principal officer who must by appointed by the President by and with the advice and consent of the Senate, or merely an "inferior officer" who can be appointed by the President alone, by a court of law, or by the "head of a department," it is clear that he was not appointed in any manner permitted by the Constitution.

CONCLUSION

Petitioners respectfully request that this petition for a writ of certiorari be granted. The decision of the courts below constitutes a gross departure from the requirements of federal statutory and constitutional law and raises significant issues that have far reaching national interest and should be addressed by this Court. The need for such review is especially acute in view of the fact that the statute pursuant to which the IG-LSC, as well as the inspector generals of more than thirty other federal agencies, were appointed is plainly constitutionally defective.

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22. Four justices joined in a concurring opinion in *Freytag* which indicated that the Tax Court can and should be considered as a department for purposes of the Appointments Clause. *See* 501 U.S. at 892, 915-22 (concurring opinion of Justice Scalia). Even under this view, however, LSC would still not qualify as a "department."

Respectfully submitted,

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APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED ON MAY 22, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22 day of May, two thousand and three.

PRESENT:

Hon. John M. Walker, Jr.,
Chief Judge,
Hon. Roger J. Miner,
Hon. Joseph M. McLaughlin,
Circuit Judges.

02-9097

BRONX LEGAL SERVICES and
QUEENS LEGAL SERVICES CORP.,

Plaintiffs-Appellants,

- v. -

LEGAL SERVICES CORPORATION,
LEGAL SERVICES FOR NEW YORK CITY and
EDOUARD R. QUATREVAUX, Inspector General
of the Legal Services Corporation,

Defendants-Appellees.

Appendix A

Appeal from the United States District Court for the Southern District of New York (George B. Daniels, *District Judge*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be and it hereby is **AFFIRMED.**

Plaintiffs Bronx Legal Services and Queens Legal Services Corp. ("BLS/QLS") appeal from the district court's judgment entered August 19, 2002 granting summary judgment to defendants and dismissing plaintiffs' claims for declaratory judgment and injunctive relief. BLS/QLS argue that the district court erred because (1) Public Law No. 104-134, § 509(h), 110 Stat 1321 (1996) ("§ 509(h)") does not require disclosure of client names when such disclosure might reveal client secrets, (2) § 509(h) is unconstitutional if it does require such disclosure, and (3) Legal Services For New York City's ("LSNY") and the Legal Services Corporation's ("LSC") request for information was not "reasonable and necessary" as required by BLS/QLS's contracts with LSNY and thus BLS/QLS was not required to respond. We disagree.

We review a grant of summary judgment *de novo*. *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 285-86 (2d Cir. 2002). Summary judgment is appropriate only if there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

In this case, we find that summary judgment was appropriate because (1) providing client names would not

present a conflict with New York State Codes, Rules and Regulations § 1200.19 and (2) under BLS/QLS's contracts with LSNY, BLS/QLS are obligated to provide the names.

As an initial matter, we address whether § 1200.19 applies because it is possible that our interpretation of the contract between BLS/QLS and LSNY would be influenced by a finding that the requested disclosure of client names would violate a disciplinary rule. In this case, however, there would be no violation.

Section 1200.19 bars attorneys from revealing client confidences or secrets except when, among other reasons, disclosure is "required by law or court order." 22 N.Y.C.R.R. § 1200.19(c)(2). In this case, BLS/QLS is required by law to provide the names. Section 509(h) requires that recipients of LSC funds provide "time records, retainer agreements, . . . and client names . . . except for reports or records subject to the attorney-client privilege." The pertinent regulation, which was in place when Congress passed § 509(h), requires that retainer agreements "clearly identify . . . the matter in which representation is sought [and] the nature of the legal services to be provided." 45 C.F.R. § 1611.8(a). Thus, when Congress passed § 509(h), requiring that grantees provide both "retainer agreements . . . and client names," it "required by law" the disclosure of any client secrets that might be revealed if a client name were connected to information on the nature of the representation. Our conclusion is consistent with that reached by the D.C. Circuit in *United States v. Legal Services for New York City*, 249 F.3d 1077, 1083 (D.C. Cir. 2001).

Appendix A

The contract between BLS/QLS and LSNY unambiguously requires that BLS/QLS provide LSNY "time records, retainer agreements, . . . and client names." Contract For Provision of Legal Assistance § 3.2(c). The contract thus plainly requires that BLS/QLS provide their clients' names as well as the information contained in its attorney time records and retainer agreements, which generally include the nature of the legal issue for which representation is sought.

Finally, BLS/QLS argue that under Condition 10 of the contract, they are obligated to respond to only "reasonable and necessary" information requests. This claim is meritless because Condition 9, which requires that BLS/QLS provide "time records, retainer agreements . . . and client names," expressly overrides Condition 10.

Because there are no genuine issues of fact concerning BLS/QLS's duties under the contract and because the contracts plainly demonstrate that defendants are entitled to judgment as a matter of law on BLS/QLS's claims, summary judgment is appropriate. We therefore need not consider either plaintiffs' constitutional claims, which in any event, we would find to be without merit, or the Inspector General's claim to sovereign immunity.

Accordingly, for the reasons set forth above, the judgment of the district court is hereby **AFFIRMED.**

FOR THE COURT
Roseann B. MacKechnie, Clerk
By: s/ Lucille Carr
Lucille Carr, Deputy Clerk

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 7, 2002 AND FILED AUGUST 8, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

00 CIV. 3423(GBD)

BRONX LEGAL SERVICES and
QUEENS LEGAL SERVICES CORP.,

Plaintiffs,

v.

LEGAL SERVICES CORPORATION, LEGAL SERVICES FOR NEW YORK CITY, and LEONARD KOCZUR, Acting Inspector General of the Legal Services Corporation,

Defendants.

MEMORANDUM OPINION AND ORDER

GEORGE B. DANIELS, DISTRICT JUDGE:

The parties in this action have made cross-motions for summary judgment. For the reasons set forth below, defendants' motions for summary judgment are granted and

plaintiffs' cross-motion for summary judgment is denied. As a result, the other motions pending in this action are moot.[1]

Background

Defendant Legal Services Corporation ("LSC"), which is headquartered in Washington, D.C., is a non-profit corporation created by Congress in the Legal Services Corporation Act of 1974, 42 U.S.C. §§ 2996 *et seq* ("LSC Act"). LSC was established "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. § 2996b(a). Pursuant to this statute, LSC contracts to provide funding to various grantee organizations throughout the United States, among them defendant Legal Services for New York City ("LSNY"). LSNY does not provide any direct legal services to clients, but distributes the funding it receives to various subgrantee organizations in New York City. Plaintiffs, Bronx Legal Services and Queens Legal Services Corporation, are non-profit organizations that receive funding from LSNY to provide legal services to eligible low income individuals in New York City.[2] LSNY provides funding to plaintiffs pursuant to contracts ("the Contracts") negotiated and executed in New York and governed by New York law.

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1. The other motions pending in this action are the Inspector General's Motion to Dismiss or Stay, Plaintiff's Motion for a Preliminary Injunction, and Legal Services for New York City's Motion for Retention of the Inspector General as a Party.

2. Legal Services for the Elderly ("LSE") was formerly a plaintiff in this action. Pursuant to a stipulation between the parties, this Court dismissed LSE's claims as moot on December 3, 2001.

Appendix B

In 1999, the Office of the Inspector General of LSC ("OIG") decided to audit the accuracy of the reporting data provided to LSC. OIG made two separate requests or "data calls" to a sample of LSC grantees chosen at random, including LSNY. In data call number one, the OIG requested that LSNY, and plaintiffs through LSNY, produce information which included case numbers and problem codes without client names. In data call number two, the OIG requested client names and case numbers for each closed case. Plaintiffs refused to provide to LSNY, and LSNY refused to provide to the OIG, the full name of each client. Plaintiffs and LSNY maintained that production of this information, coupled with the problem codes previously produced, would require disclosure of privileged information and would violate the Code of Professional Responsibility of the New York State Bar Association and the Disciplinary Rules of the Appellate Division of the New York Supreme Court.

On or about March 22, 2000, the OIG issued an administrative subpoena requiring LSNY to produce the client names at the OIG in Washington, D.C.. On April 25, 2000, the OIG filed a petition in the United States District Court for the District of Columbia for summary enforcement of the administrative subpoena ("the D.C. Action"). Plaintiffs were neither served with the subpoena, nor named as respondents in the summary enforcement proceeding in the District of Columbia. However, they feared that LSC would terminate LSNY's funding for failure to provide the information required by the subpoena and LSNY might, in turn, terminate plaintiffs' funding for the same reason. Therefore, on May 4, 2000, plaintiffs commenced this action requesting that this Court declare that defendants have

no right to demand from plaintiffs, and plaintiffs have no obligation to provide to defendants, the additional information that the OIG subpoenaed from LSNY. They also request that this Court enjoin defendants from depriving plaintiffs of funding, and from terminating and debarring plaintiffs from any future funding, as a result of their refusal to provide the additional information.

On June 14, 2000, the D.C. District Court issued a decision in favor of OIG on the petition for summary enforcement of the administrative subpoena. *See United States v. Legal Services for New York City*, 100 F. Supp. 2d 42 (D.D.C. 2000). The court rejected LSNY's blanket assertion of attorney-client privilege, while not foreclosing specific claims regarding individual clients. That court also held that the requirement under section 509(h) of the 1996 Omnibus Appropriations Act that recipients of LSC funds produce client names to auditors (1) was unambiguous in its requirement that LSC grantees make available client names, irrespective of their context, and (2) provided a legal basis for lawyers under subpoena to disclose client names without breaching their obligations under New York's rules of ethics. *Id.* That decision was affirmed on appeal and remanded to the district court to allow LSNY to make any specific privilege claims. *United States v. Legal Services for New York City*, 249 F.3d 1077 (D.C. Cir. 2001).

After the decisions in the DC Action, LSNY requested that plaintiffs provide the requested information to LSNY and the OIG pursuant to the Contracts. Plaintiffs continued to refuse to provide such information to LSNY.

Appendix B

OIG and LSC now move for summary judgment. LSNY moves for partial summary judgment with the exception of plaintiff's claims, if any, of attorney-client privilege with regard to any individual clients. Plaintiffs have indicated that they "are not asserting asserting attorney-client privilege as a basis for refusing to provide the information." (Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Cross-Motion for Summary Judgment ("Pls.' Mem.") at 5.) Thus, a decision in LSNY's favor is also dispositive of this action. Plaintiffs oppose these motions and makes a cross-motion for summary judgment.

Discussion

Under Rule 56, summary judgment may be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c).* A genuine issue of material fact for trial exists if, based on the record as a whole, a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A district court must view the record in the light most favorable to the nonmoving party by resolving all ambiguities and drawing all reasonable inferences in favor of that party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986); *Anderson*, 477 U.S. at 255; *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1304 (2d Cir. 1995). The moving party bears the burden of demonstrating that no genuine issue of material fact exists. *Anderson*, 477 U.S. at 256; *Tomka*, 66 F.3d at 1304.

Appendix B

Plaintiffs argue that they are prohibited from producing the client names requested by the OIG because, when coupled with the problem codes that were previously disclosed, the information constitutes a client secret. Section 1200.19 of New York's Disciplinary Rules, 22 N.Y.C.R.R. 1200.19, states that "[e]xcept when permitted under 1200.19(c) of this Part, a lawyer shall not knowingly: (1) reveal a . . . secret of a client." Section 1200.19(c)(2) provides that "[a] lawyer may reveal . . . secrets when . . . required by law or court order." *Id.* A "secret" is defined as "other information gained in the professional relationship [besides information protected by the attorney-client privilege] that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." *Id.*

Plaintiffs assert that the requested information is a client secret for two reasons. First, plaintiffs asserts that disclosure of the fact of plaintiffs' representation of individual clients is embarrassing to the clients because it reveals that the clients are indigent. (Pls.' Mem. at 11-12.) Second, plaintiffs assert that they represent their clients on "personal, sensitive matters" and their clients would be embarrassed by disclosure of the nature of the representation. (Pls.' Mem. at 12.) Plaintiffs do not cite any caselaw that supports these assertions. As legal support for their position, plaintiffs cite ethical opinions issued by the American Bar Association and the opinions of the legal ethics experts that they have consulted on this matter. (Pls.' Mem. at 9-10 & 12-13.) As an initial matter, none of the ABA ethical opinions cited by plaintiffs present a situation such as this one where the OIG has requested information pursuant to statutory

authority. Furthermore, the opinions offered by plaintiffs do not have the force of law and this Court is not bound by them. *See Grievance Committee for Southern Dist. Of New York v. Simels*, 48 F.3d 640, 645; *United Trans. Union Local Unions 385 and 77 v. Metro-North Commuter Railroad Co.*, 1995 WL 634906, *5-6 (S.D.N.Y. Oct. 30, 1995). There is no legal basis for this Court to conclude that disclosure of the existence or nature of a client's representation in this context would reveal a client secret. However, this Court need not reach this issue because disclosure of the client names requested by defendants is required by law.

Plaintiffs argue that the LSC Act does not require recipients of LSC funds to disclose client secrets and specifically provides that LSC shall not interfere with an attorney's ethical obligations. *See* 42 U.S.C. § 2996e(b)(3).[3] However, section 509(h) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-

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3. 42 U.S.C. § 2996e(b)(3) reads:

> The Corporation [LSC] shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association (referred to collectively in this subchapter as "professional responsibilities") or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities.

134, 110 Stat. 1321, 1321-59 (1996) ("Section 509(h)"), supersedes the restrictions of § 2996e(b)(3) of the LSC Act. Section 509(h) states that:

> *Notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3))*, financial records, time records, retainer agreements, client trust fund and eligibility records, and *client names*, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation, except for reports or records subject to the attorney-client privilege.

Id. (emphasis added). Plaintiffs argue that Section 509(h) does not require disclosure of client names along with the nature of the legal representation. This argument fails. In the DC Action, the district court held that the reference in Section 509(h) to client names did not "depend upon context." 100 F. Supp. 2d at 47. The court of appeals affirmed the district court's ruling and noted that, since LSC regulations require retainer agreements to contain the nature of the legal representation, disclosure of retainer agreements along with client names under Section 509(h) "would reveal exactly the sort of information" sought to be withheld, that is "the general matter of individual clients' representations." 249 F.3d at 1083 (citations omitted). The court of appeals

rejected LSNY's argument that Section 509(h) does not require disclosure of retainer agreements in a manner that connects the agreements with client names and stated that "if Congress had intended to require production of 'time records, retainer agreements, . . . and client names' only when disassociated from one another, surely it would have said so in terms different from the simple conjunctive phrasing in § 509(h)." *Id.*

This Court agrees with the D.C. Court of Appeals' interpretation of Section 509(h) and will not graft additional requirements into the statute that were not included or intended by Congress. Therefore, even if the requested information does constitute a client secret, plaintiffs are relieved of any perceived ethical obligations to withhold client names and the nature of the representation because they are required by law to disclose the requested information. *See* 22 N.Y.C.R.R. 1200.19(c)(2). Plaintiffs do not dispute that they are recipients of LSC funds through LSNY, and plaintiffs are not exempt from the requirements of section 509(h) merely because the funds that they receive from LSC are funneled through LSNY.

Furthermore, the provisions of the Contracts also require plaintiffs to provide the requested information to defendants. Section 14.3 of the Contracts states that, notwithstanding any other provisions of the Contracts, plaintiffs will comply with the " 'Assurances Given By Applicant as Condition for Approval of Grant' made by LSNY to [LSC], a copy of which Assurances has been provided to [plaintiffs]." (Scherer Decl., Exh. A at 27, § 14.3; Scherer Decl., Exh. B at 27, § 14.3.) The Assurances provide that LSNY and plaintiffs

will "comply with the [LSC Act], and *any applicable appropriations act* and any other applicable law, all requirements of the rules and regulations, policies, guidelines, instructions, and other directives of [LSC]. . . ." (Schwartz Decl., Exh. E at 12, § 1.) (emphasis added.) Section 509(h) is one such applicable appropriations act, particularly because it references the LSC Act. A provision in the Assurances also substantially duplicates Section 509(h).[4] (Schwartz Decl., Exh. E at 12, § 9.) Additionally, a provision in the Contracts themselves substantially duplicates Section 509(h).[5] (Scherer

4. Section 9 of the Assurances reads:

> [n]otwithstanding grant assurance number 10 below, and § 1006(b)(3) of the LSC Act, 42 U.S.C. § 2996e(b)(3), [LSNY and plaintiffs] shall make available financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, except for those reports or records which would properly be denied pursuant to the attorney- client privilege, to [LSC] and any federal department or agency that is auditing or monitoring the activities of [LSC, LSNY or plaintiffs] and any independent auditor or monitor receiving federal funds to conduct such auditing or monitoring, including any auditor or monitor of [LSC].

5. Section 3.2(c) of the Contracts reads:

> [n]otwithstanding paragraphs (a) and (b) above, and § 1006(b)(3) of the LSC Act, 42 U.S.C. § 2993(b)(3) [sic] [plaintiffs] shall make available financial records, time records, retainer agreements, client trust funds and eligibility records, and client names, except for those

(Cont'd)

Decl., Exh. A. at 4, § 3.2(c); Scherer Decl., Exh. B. at 4, § 3.2(c).) As these provisions in the Assurances and in the Contracts incorporate Section 509(h), they are entitled to the same interpretation that this Court has given Section 509(h), which is that these provisions require plaintiffs to disclose the requested information.

Plaintiffs other arguments are also without merit. Plaintiffs argue that the information requested by defendants is unnecessary and unreasonable. However, this issue has already been decided in the DC Action. In that action, LSNY contested the reasonableness of the information requested by the OIG and argued that the request was unduly burdensome. Both the D.C. District Court and the D.C. Court of Appeals rejected LSNY's argument. The district court stated that "[i]t is not the province of this court to decide the best way for . . . OIG to carry out its responsibilities" and held that OIG's request was not unreasonable. 100 F. Supp. 2d at 47. The court of appeals affirmed the decision of the district court and held that the information was relevant and would not "unduly disrupt or seriously hinder normal operations." 249 F.3d at 1084 (citations omitted). In the present action, LSNY is merely requesting from plaintiffs the information requested of LSNY by the OIG. This

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(Cont'd)

> reports or records which would properly be denied pursuant to the attorney-client privilege, to LSNY and any Federal department or agency that is auditing or monitoring the activities of [LSC], LSNY or [plaintiffs] and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of LSNY.

information has already been determined to be reasonable in the DC Action and plaintiffs have offered no basis for this Court to make a different finding.

Plaintiffs also argue that the Inspector General Amendments Act of 1988, 5 U.S.C. app. 3, is unconstitutional. This act designates LSC as a "designated Federal entity" and grants the OIG the authority "to require by subpena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act. . . ." 5 U.S.C. app 3 §§ 8G(a)(2) & 6(a)(4). Plaintiffs argue that the OIG is not a governmental entity and Congress unconstitutionally delegated its legislative power to a private entity by giving the OIG the authority to subpoena. Plaintiffs attempt to support their argument with two cases. However, these cases are readily distinguishable.

Plaintiffs quote language from *Loving v. United States*, 517 U .S. 748, 758 (1996), stating "[t]he fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity" and from *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935), stating "Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." (Pls.' Mem. at 22.) The holding in *Loving* is actually contrary to plaintiff's position. The Court held that Congress has limited delegation powers. *See Loving*, 517 U.S. at 751 (holding Congress has power to delegate its constitutional authority to the President to define "aggravating factors that permit a court-martial to impose the death penalty upon a member of the Armed Forces convicted of murder.")

Appendix B

The language plaintiff quotes from the opinion was merely a statement of the general rule in order to illustrate an exception to the rule. In *Panama Refining Co.*, the Court held that legislation which delegated unlimited authority to the President to pass a law prohibiting the transportation of petroleum and petroleum products was unconstitutional. 293 U.S. 388. The Court stated that while Congress has the authority to delegate some of its functions to others, it may not delegate an essential lawmaking function to an entity without prescribing some limits to the entity's authority. *Id.* at 421-33. In contrast to the unlimited lawmaking authority delegated in *Panama Refining Co.*, the Inspector General Amendments Act of 1988 merely grants the OIG limited authority to subpoena specific information in conducting audits. Thus, *Panama Refining Co.* is also inapposite. Accordingly, there is no basis for this Court to hold that the Inspector General Amendments Act of 1988 is unconstitutional.

Plaintiffs also argue that Section 509(h) is unconstitutional. Plaintiffs cite three reasons in support of this argument. First, plaintiffs argue that Section 509(h) violates the separation of powers principle because it infringes on the judicial function of regulating attorneys by requiring attorneys who receive LSC funds to disclose client secrets. However, New York's ethical rules allow attorneys to reveal client secrets when required by laws such as Section 509(h), thereby foreclosing any infringement arguments. *See* 22 N.Y.C.R.R. 1200.19(c)(2).

Plaintiffs argue that Section 509(h) violates the First Amendment by requiring disclosure of the identity of clients

exercising their right of association to consult with an attorney, without any compelling need for the disclosure. However, there is a sound reason for the defendants' request. OIG is requesting the information from LSNY, and LSNY is requesting the information from plaintiffs, because OIG is carrying out the purposes for which it was established, to audit and investigate LSC and recipients of LSC funds. *See* 5 U.S.C. app 3 § 2.

Plaintiffs final constitutional argument is that Section 509(h) violates due process and equal protection by requiring disclosure of client secrets as a condition of receiving federal funds. Plaintiffs argue that clients' due process rights are violated because they are required to unreasonably disclose their association with plaintiffs as a condition of receiving federally funded legal services. As previously stated, the information requested is not unreasonable and the OIG is requesting the information to fulfill its statutory functions. Plaintiffs' equal protection argument is that only indigent people are affected. However, indigence alone is not a suspect class under equal protection analysis. *See, e.g., Maher v. Roe*, 432 U.S. 464, 471 (1977) (citations omitted) (the Supreme Court "has never held that financial need alone identifies a suspect class for equal protection analysis."); *Woe v. Cuomo*, 729 F.2d 96, 103 (2d Cir.1984) (citations omitted) ("[t]he Supreme Court has consistently held that poverty without more is not a suspect classification."). Accordingly, there is no basis for this Court to hold that Section 509(h) is unconstitutional.

For the foregoing reasons, defendants' motions for summary judgment are granted and plaintiff's cross-motion for summary judgment is denied. The other motions pending in this action are, therefore, moot.

Dated: New York, New York
August 7, 2002

SO ORDERED:

s/ George B. Daniels
GEORGE B. DANIELS
United States District Judge

APPENDIX C — RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Article II, Section 2, Clause 2 of the U.S. Constitution, which provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

42 U.S.C. § 2996e(b)(3), which provides:

> The Corporation [LSC] shall not, under any provision of this subchapter interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association . . . or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce standards of professional responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities.

Appendix C

42 U.S.C. §§ 2996f(a)(1) and (10), which provide:

> With respect to grants or contracts in connection with the provision of legal assistance to eligible clients under this subchapter, [LSC] shall —
>
> > (1) insure the maintenance of the highest quality of service ***and professional standards*** [and] the preservation of attorney-client relationships . . . (emphasis added).
> >
> > * * *
> >
> > (10) ***insure that all attorneys***, while engaged in legal assistance activities supported in whole or in part by the Corporation, ***refrain from . . . any . . . activity prohibited by the Canons of Ethics and Code of Professional Responsibility*** of the American Bar Association. . . ." (emphasis added).

42 U.S.C. § 2996(6), which provides:

> [A]ttorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession.

Appendix C

Section 509(h) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-59 (April 26, 1996) which provides:[1]

> Notwithstanding Section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. § 2996e(b)(3), financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the Corporation [LSC] or of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation, except for reports or records subject to the attorney-client privilege.

Section 104 of the Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515 (Oct. 18, 1988) (codified as amended at 5 U.S.C. App. 3 § 8G), which provides:

> [T]he term 'designated Federal entity' means . . . the Legal Services Corporation. . . .

---

1. Section 509(h) of the 1996 Omnibus Appropriations Act expired at the end of the relevant appropriations period. However, it (as well as certain other legislative restrictions relating to LSC that were contained in the 1996 Appropriations Act) has been extended annually by subsequent appropriations acts.

Appendix C

> [T]here shall be established and maintained in each designated Federal entity an Office of Inspector General. . . .
>
> [T]he Inspector General [of a 'designated Federal entity'] shall be appointed by the head of the designated Federal entity in accordance with the applicable laws and regulations governing appointments within the designated Federal entity."

Rule 1200.19 of the attorney disciplinary rules of the Appellate Division of the New York State Supreme Court (22 NYCRR § 1200.19),[2] which provides as follows:

> (a) ***Confidence*** refers to information protected by the attorney-client privilege under applicable law, and ***secret*** refers to ***other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client*** (emphasis added).

---

2. The disciplinary rules of the New York Supreme Court are essentially the same as the disciplinary rules that are included as part of the New York Lawyers' Code of Professional Responsibility, except that they have the added force of being promulgated as official court rules. Thus, 22 NYCRR § 1200.3 provides that "[a] lawyer or law firm shall not . . . [v]iolate a disciplinary rule. . . ." Section 1200.19 is identical to Disciplinary Rule 4-101 of the Lawyers' Code of Professional Responsibility.

(b) Except when permitted under section 1200.19(c) of this Part, ***a lawyer shall not knowingly . . . reveal a confidence or secret of a client*** (emphasis added).

* * *

(c) A lawyer may reveal . . . [c]onfidences or secrets when permitted under disciplinary rules or ***required by law*** or ***court order*** (emphasis added).

Rule 1200.26(b) of the attorney disciplinary rules of the Appellate Division of the New York State Supreme Court (22 NYCRR § 1200.26),[3] which provides as follows:

Unless authorized by law, a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services, ***or to cause the lawyer to compromise the lawyer's duty to maintain the confidences and secrets of the client*** under section 1200.19(b) of this Part (emphasis added).

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3. This is identical to DR 5-107(b) of the N.Y. Lawyers Code of Professional Responsibility.

(3)

No. 03-288

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BRONX LEGAL SERVICES and QUEENS LEGAL SERVICES,

Petitioners,

—v.—

LEGAL SERVICES CORPORATION, LEGAL SERVICES FOR NEW YORK CITY, and LEONARD KOCZUR, Acting Inspector General of the Legal Services Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF LEGAL SERVICES CORPORATION IN OPPOSITION

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11 pp

STATEMENT PURSUANT TO RULE 29.6

Respondent Legal Services Corporation has no parent companies or non-wholly owned subsidiaries.

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22 N.Y.C.R.R. § 1200.19 2

STATEMENT OF THE CASE

This case is about Petitioners' refusal to provide information required by a valid administrative subpoena. That subpoena was ***not*** issued by Legal Services Corporation ("LSC"). Rather, it was issued by the Inspector General of LSC (the "Inspector General"), in connection with a congressionally mandated audit conducted by the Inspector General.

LSC is only in this case because it issued a proposed determination to suspend the funding it provides to Legal Services of New York ("LSNY") because of LSNY's failure to produce the information requested by the Inspector General. LSC's regulatory authority to issue the proposed determination is not at issue. Rather, the issue is the Inspector General's entitlement to the requested information. Accordingly, LSC will not address issues directed at Inspector General (such as the constitutionality of the Inspector General Act). Moreover, LSC will not burden the Court by repeating the Inspector General's statement of questions presented, statement of facts and legal arguments, but, rather, incorporates them by reference.

REASONS FOR DENYING THE WRIT

A. The Court of Appeals Correctly Rejected The Argument That There Is Any Conflict Between The Appropriations Act(s) and the LSC Act

Contrary to Petitioners' tortured attempt to manufacture a statutory conflict between the disclosure obligations of § 509(h) of the 1996 Appropriations Act and the LSC Act's mandate that LSC-funded lawyers provide services in a manner consistent with their professional responsibilities, the two provisions are perfectly consistent with one another.

The LSC Act provides that LSC-funded lawyers act in compliance with the Code of Professional Responsibility and the Canons of Ethics. App. 21a (42 U.S.C. § 2996(6)). This includes the obligation to comply with the rules governing the disclosure of client secrets, which, as it applies in this case, are embodied in the Disciplinary Rules of the Appellate Division of the New York. App. 23a-24a (22 N.Y.C.R.R. § 1200.19). That rule provides, in relevant part, that "a lawyer may reveal . . . [c]onfidences or secrets when permitted under disciplinary rules ***or required by law or court order***." (emphasis added). Thus, when a law requires disclosure, the lawyer making the disclosure does not violate the Code of Professional Responsibility. And, in turn such disclosure by a Legal Services-funded lawyer does not violate the LSC Act.

As the lower courts properly concluded, Section 509(h) of the Appropriations Act requires disclosure of the information sought by the Inspector General. Thus, such disclosure—required by law—does not compel the LSC-funded attorney providing the information to violate the Code of Professional Responsibility.

In short, there is no conflict between the LSC Act and the Appropriations Act. Petitioners' argument to the contrary, *i.e.*, that there is a conflict and that the LSC Act must be accorded primacy because there is no basis for finding that that in enacting section 509(h) of the 1996 Appropriations Act, Congress impliedly repealed section 2996(6) of the LSC Act, is built on a faulty premise. It is also wrong as a matter of statutory interpretation. If repeal by implication was relevant (which it is not), the plain text of section 509(h) makes clear that Congress knew that it was directing the disclosure of information that, absent the legislation, might be protected from dis-

closure under the LSC Act. Thus, section 509(h) states, in relevant part, that

> ***Notwithstanding*** Section 1006(b)(3) of the Legal Services Corporation Act 42 U.S.C. § 2996e(b)(3), financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient, shall be made available to any auditor or monitor, including any Federal department or agency that is auditing or monitoring the activities of [LSC] or of the recipient . . . except for reports or records subject to the attorney-client privilege.

App. 22a (emphasis added). By expressly referencing the LSC Act's provision concerning the ethical and professional obligations of LSC-funded lawyers, the statute makes clear that Congress was aware that the information it was requiring to be disclosed in connection with audits of LSC (and LSC recipients) might implicate lawyers' obligations under the Code of Professional Responsibility. And the statute makes clear that, other than where disclosure would run afoul of the attorney-client privilege—which is not at issue here—the information is to be disclosed.

Thus, unlike *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), this is not a case where the text of an appropriations bill was silent as to the possible conflict with another statute. Rather, Congress expressly recognized the existence of a statute that might be read to conflict with the disclosure requirement of the appropriations bill, and unequivocally stated that notwithstanding the earlier statute, the appropriations legislations was to control. Under such circumstances, the appropriations bill controls. *See, e.g., United States v. Dickerson*, 310 U.S. 554 (1940) (where appropriations bill stated that certain payments were not to be made, "notwithstand-

ing" provisions of earlier statute mandating payment, the appropriations bill controlled).

B. The Court of Appeals Correctly Rejected Petitioners' Constitutional Arguments

In affirming the district court's rejection of Petitioners' constitutional claims, the court of appeals correctly concluded those claims were "without merit." App. 4a.

First, Petitioners argue that if Section 509(h) requires client names to be produced along with problem codes, it violates the doctrine of separation of powers in that the legislative branch has usurped the judiciary's role of regulating attorneys. They are wrong. The disciplinary rule in question expressly recognizes that the legislature may pass a law requiring an attorney to disclose information that, but for the law, the attorney would be barred from disclosing as a client secret. See App. 23a-24a. And that very same rule expressly permits the attorney to comply with that law and produce the information, without violating the disciplinary rule. *Id.* Thus, the judiciary has recognized the right of the legislative branch to require production of client secrets. Accordingly, Congress has not interfered with nor encroached upon the courts' attempts to regulate the conduct of attorneys.

Petitioners' reliance on *Velazquez v. Legal Services Corporation*, 531 U.S. 545 (2001) is misplaced. *Velazquez* concerned Congress' ability to impose viewpoint-based limits on the arguments a lawyer could make on behalf of a client. This Court held that such limits intruded upon and interfered with the role of the courts in adjudicating cases. *Id.* at 545-546. No such limits are at issue here. The lower courts properly rejected Petitioners' separation of powers argument.

Second, Petitioners argue that by requiring the production of client names and problem codes in conjunction with the Inspector General's audit of a federal subsidy program, Section 509(h) violates the rights of indigent clients to consult with their attorneys. This argument fails as well, because it assumes a right that does not exist. In this regard, Petitioners' newfound reliance on the Sixth Amendment as the source of this purported right is entirely misplaced. That amendment is limited to criminal cases. The Legal Services program only provides fund for representations in civil cases. The Sixth Amendment has nothing to do with this case.

Neither does the First Amendment. This Court has never held that indigent litigants in civil cases have a constitutional right to an LSC-funded lawyer. The cases cited by Petitioners are irrelevant because they deal with private relationships. Even if the information at issue would be protected from disclosure in the latter context (a proposition which need not be decided here), a different result is mandated in the context of this case—a federally-funded legal services program where the relationship at issue is created by the federal subsidy and the information is sought to make sure that those funds are being expended on real clients actually receiving legal services. *Cf., St. Germain of Alaska Orthodox Catholic Church v. United States*, 840 F.2d 1087, 1094 (2d Cir. 1988) (enforcement of tax laws overrides religious associational interests).

Finally, the lower courts correctly rejected Petitioners' due process and equal protection arguments. The due process argument is simply a repackaging of the First Amendment claim, *i.e.*, that Section 509(h) interferes with an indigent client's right to associate with an LSC-funded lawyer. As explained in the preceding paragraph, no such right exists. Thus, no due process claim

exists either. The equal protection claim fails because indigence is not a suspect classification entitled to strict scrutiny. *See, e.g., Maher v. Roe,* 432 U.S. 464, 471 (1977). Petitioners attempt to avoid this result by arguing that the government's control over the court system somehow elevates indigence to a suspect classification. Again, they rely on cases in the criminal context. And again, Petitioners are wrong.

Whatever the case may be in the criminal context, this Court has rejected the argument that indigence is a suspect classification in cases involving claims of denial of access to the civil litigation system. Thus, in *Ortwein v. Schwab,* 410 U.S. 656 (1973) this Court upheld the constitutionality of a civil filing fee against a challenge that the fee violated the equal protection clause because it prevented an indigent person from challenging a reduction in his welfare benefits. In doing so, the Court held that indigence was not a suspect classification, and therefore applied a rational basis standard of review. *See also United States v. Kras,* 409 U.S. 434 (1973) (same with respect to refusal to waive bankruptcy filing fee). The lower courts correctly found that there was a rational basis for the Inspector General to have requested the information at issue. Nothing else was required. The due process and equal protection claims were properly rejected.

CONCLUSION

The issues raised in this petition are not novel. They do not present any conflict with prior rulings of this Court. They do not present any conflict with the decisions of other circuit courts of appeal. In short, there is no reason for this Court to grant the petition. The petition for a writ of certiorari should be denied.

Dated: New York, New York
October 22, 2003

Respectfully submitted,

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(2)

No. 03-288

In the Supreme Court of the United States

BRONX LEGAL SERVICES AND
QUEENS LEGAL SERVICES CORP., PETITIONERS

v.

LEGAL SERVICES CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The Office of Inspector General of the Legal Services Corporation requested client names from Legal Services for New York City (LSNY), and LSNY, in turn, requested those names from petitioners. Petitioners' contracts with LSNY incorporate the requirements of a federal law that compels the disclosure of client names if requested by federal auditors. The questions presented are:

1. Whether petitioners' contracts with LSNY require petitioners to furnish the client names.

2. Whether the statute compelling disclosure of client names is constitutional.

3. Whether the appointment of the Inspector General violates the Appointments Clause.

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In the Supreme Court of the United States

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter, but is reprinted in 64 Fed. Appx. 310. The order of the district court (Pet. App. 5a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2003. The petition for a writ of certiorari was filed on August 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Legal Services Corporation (LSC) is a non-profit corporation established under the Legal Services Corporation Act of 1974. See 42 U.S.C. 2996b(a). LSC's mission is to provide "legal assistance in non-criminal proceedings or matters to persons financially unable to afford legal assistance." *Ibid.* LSC does not provide those services directly; instead, it makes grants to legal service organizations to provide the services. The legal service organizations either provide the services directly or subcontract with other legal service organizations to provide them.

The Legal Services Corporation Act generally does not permit LSC to "interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association," or "abrogate as to attorneys * * * the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction." 42 U.S.C. 2996e(b)(3). Section 509(h) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-59, however, creates an express exception to Section 2996e(b)(3). Section 509(h) provides that, notwithstanding Section 2996e(b)(3), recipients of funding from the LSC can be required to furnish to federal auditors "financial records, time records, retainer agreements, client trust fund and eligibility records, and client names." § 509(h), 110 Stat. 1321-59. Congress has incorporated Section 509(h) by reference in subsequent appropriations Acts.

2. LSC provides funding to Legal Services for New York City (LSNY). Pet. App. 6a. LSNY, in turn,

distributes funding to Bronx Legal Services and Queens Legal Services (petitioners). *Ibid.* The contracts through which LSNY provides funding to petitioners require that petitioners comply with certain "Assurances." *Id.* at 13a. One of the Assurances substantially duplicates the disclosure obligation in Section 509(h). A provision in the contracts also incorporates that obligation. *Ibid.*

3. The Inspector General Act of 1978, 5 U.S.C. App. 1, establishes Offices of Inspector General as "independent and objective units" in each of various federal agencies and entities, including LSC. 5 U.S.C. App. 2, 8G(2). The Inspector General has authority to audit and investigate LSC programs and operations. 5 U.S.C. App. 4(a)(1).

In 1998, the Inspector General discovered through a series of audits that some grantees had overstated the number of cases handled in their reports to the Corporation and had kept inadequate records. *United States* v. *Legal Servs. For New York City*, 249 F.3d 1077, 1079 (D.C. Cir. 2001). In November 1999, a congressional conference committee raised concerns about inaccuracies in grantee reports and requested the Inspector General to "assess the case service information provided by the grantees" and "report * * * no later than July 30, 2000, as to its accuracy." H.R. Conf. Rep. No. 479, 106th Cong., 1st Sess. 232 (1999).

The Inspector General then developed a plan to assess the accuracy of 1999 case statistics based on a sample of LSC grantees, including LSNY. The Inspector General made two separate requests or "data calls" to the selected grantees. Pet. App. 7a. The first data call requested the case number and legal problem code for each closed case. *Ibid.* The problem codes describe the subject matter of the representation in terms such

as "Parental Rights Termination," "Education," and "Contracts." *Legal Servs. For New York City*, 249 F.3d at 1080. The second data call required the production of the case number and the client name for each closed case. Pet. App. 7a. The Inspector General constructed a "Chinese wall" separating the client names from the problem codes so that it would not be possible to link a particular client to the subject matter of his representation. *Legal Servs. For New York City*, 249 F.3d at 1080.

Petitioners refused to provide to LSNY, and LSNY refused to provide to the Inspector General, the full name of each client as requested in the second data call. Pet. App. 7a. LSNY maintained that production of the client names, coupled with the information from the first data call, would require disclosure of privileged information and would violate state ethical rules. *Ibid.*

The Inspector General issued an administrative subpoena requiring LSNY to produce the client names and filed a petition in the United States District Court for the District of Columbia for summary enforcement of the administrative subpoena. Pet. App. 7a. The district court rejected LSNY's blanket assertion of attorney-client privilege, while not foreclosing specific claims regarding individual clients. See *United States* v. *Legal Servs. For New York City*, 100 F. Supp. 2d 42 (D.D.C. 2000).

The District of Columbia Circuit affirmed. *Legal Servs. For New York City*, 249 F.3d at 1084. That court held that Section 509(h) authorized the Inspector General to obtain client names and that compliance with the subpoena would not violate state ethical rules. *Id.* at 1082-1084 & n.4.

4. Petitioners were not served with a subpoena or named as respondents in the Inspector General's

subpoena enforcement action against LSNY. Pet. App. 7a. They also did not seek to intervene in that proceeding. *Ibid.* Instead, petitioners filed suit in the Southern District of New York, requesting a declaratory judgment that LSNY and the Inspector General had no right to demand from them the client names that were the subject of the subpoena. *Id.* at 7a-8a. Petitioners also requested that the court enjoin LSNY and the Inspector General from depriving petitioners of funding as a result of their refusal to provide the requested client names. *Ibid.* Petitioners did not, however, assert the attorney-client privilege as a basis for refusing to provide the information. *Id.* at 9a.

The district court granted summary judgment in favor of LSNY and the Inspector General. Pet. App. 5a-19a. The court first rejected petitioners' claim that state disciplinary rules prohibit them from disclosing client names. *Id.* at 10a-12a. The court held that even assuming that the client names constitute "client secrets" under New York disciplinary rules, those rules permit a lawyer to reveal client secrets when "required by law or court order." *Id.* at 10a (quoting N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.19(c)(2) (2003)). Because Section 509(h) requires disclosure of the client names, the court concluded, such disclosures are "required by law." *Id.* at 13a.

The district court next rejected petitioners' contention that Section 509(h) impermissibly interferes with the judicial function of regulating attorneys. Pet. App. 17a. The court held that the provision in the Disciplinary Rules permitting disclosures required by law foreclosed that argument. *Ibid.* The court also rejected petitioners' contention that Section 509(h) violates the First Amendment because it interferes with the right of an individual to associate with his attorney. *Id.* at

17a-18a. The court concluded that Section 509(h) constitutionally furthers the government's interest in auditing and investigating federal funding recipients. *Id.* at 18a. For similar reasons, the court rejected petitioners' due process and equal protection challenges to Section 509(h). *Ibid.*

In an unpublished opinion, the court of appeals affirmed. Pet. App. 1a-4a. The court held that petitioners' contracts with LSNY require them to provide the client names sought by the Inspector General. The court further held that petitioners' compliance with their contracts would not violate the State's Disciplinary Rules because such disclosure is "required by law." *Id.* at 3a. Having held that petitioners have a contractual obligation to disclose client names to the Inspector General, the court determined that it need not address petitioners' constitutional challenges to Section 509(h). *Id.* at 4a. The court noted parenthetically, however, that it would in any event find those challenges to be without merit. *Ibid.*

ARGUMENT

The court of appeals' unpublished decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore not warranted.

1. The court of appeals correctly held that petitioners' contracts with LSNY require petitioners to furnish the client names that LSNY requested in response to the Inspector General's subpoena. Provisions of those contracts substantially duplicate Section 509(h), see Pet. App. 14a, and Section 509(h) explicitly requires organizations that receive funds from LSC to make available to federal auditors "financial records, time records, retainer agreements, client trust fund and

eligibility records, *and client names*." 110 Stat. 1321-59 (emphasis added).

Petitioners contend (Pet. 9) that Congress intended to require production of "client names" only when they are disassociated from problem codes. But the statutory text gives the Inspector General unqualified access to client names; it does not place any limitation on the Inspector General's authority to require the production of those names.

Petitioners argue (Pet. 10) that 42 U.S.C. 2996e(b)(3) prohibits LSC from requiring disclosure of the client names because it specifies that LSC may not "interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility." But Section 509(h) explicitly overrides Section 2996e(b)(3), providing that specified information, including "client names," must be made available to federal auditors "*[n]otwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3))*." 110 Stat. 1321-59 (emphasis added).

Petitioners further contend (Pet. 7) that New York's Disciplinary Rules prohibit them from disclosing "client secrets," and that the requested information constitutes client secrets. But even if the information constitutes client secrets (a question not decided by the courts below), the Disciplinary Rules do not prohibit the disclosure of client secrets if "required by law or court order." See 22 N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.19(c)(2) (2003). And, as the court of appeals concluded (Pet. App. 3a), making the requested client information available to LSNY is required by Section 509(h) and is therefore "required by law."

The decision below is consistent with the District of Columbia Circuit's decision in *United States* v. *Legal*

Services For New York City, 249 F.3d 1077 (2001). In that case, the District of Columbia Circuit held that "the only sensible reading" of Section 509(h) is that it authorizes the Inspector General to obtain access to client names, without regard to whether the names can be linked to problem codes. *Id.* at 1083. No other court of appeals has reached a different conclusion. Review of that issue is therefore unwarranted.

2. Petitioners argue that, if Section 509(h) requires disclosure of the client names sought by the Inspector General, it violates separation of powers principles, the First Amendment, and the doctrine of unconstitutional conditions. Pet. 15-19. Because petitioners' contracts with LSNY include a provision that duplicates Section 509(h), the court of appeals concluded that the contracts themselves required petitioners to turn over the requested information. See Pet. App. 4a. It thus concluded that it had no need to reach petitioners' constitutional challenges to Section 509(h). *Ibid.* Petitioners do not contend that the court of appeals erred in failing to decide the constitutional challenges. Indeed, petitioners do not mention their contractual obligations at all. Petitioners' constitutional challenges to Section 509(h) are therefore not properly presented here.

In any event, petitioners' constitutional challenges lack merit. Petitioners contend (Pet. 16) that Section 509(h) usurps the state judiciary's authority to regulate attorneys and therefore violates constitutional separation-of-powers principles. As an initial matter, separation-of-powers principles apply to the relationship among the branches of the federal government, not the relationship of an Act of Congress to provisions of state law, such as state attorney disciplinary rules. The latter subject is governed by the Supremacy Clause. In any event, since New York's Disciplinary Rules ex-

pressly permit attorneys to reveal "client secrets" when "required by law or court order," see N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.19(c)(2) (2003), there is no conflict between Section 509(h) and the state judiciary's authority to regulate the conduct of its attorneys.

Petitioners also err in contending (Pet. 16-17) that Section 509(h) unconstitutionally interferes with the First Amendment right of indigent clients to consult with their attorneys. The Inspector General's request for client names does not prevent indigent clients from consulting their attorneys. Moreover, as the District of Columbia Circuit explained, the Inspector General's "Chinese wall" separating client names from problem codes "renders unlikely the possibility that any secrets will be disclosed." *Legal Servs. For New York City*, 249 F.3d at 1084. Even if the names were linked with problem codes, "the information disclosed would be only the subject matter of the representation as stated in broad terms." *Ibid.* None of this Court's cases remotely supports the sort of blanket First Amendment exemption to disclosure of a professional relationship that petitioners assert here.

Petitioners, moreover, have not explained how disclosure of such general information affects communications between indigent clients and their attorneys. Furthermore, when the government funds the furnishing of services, it is entitled to ascertain the recipients of those services. Any impact on communications between indigent clients and their attorneys is clearly outweighed by the government's overriding interest in ensuring that federal funds are not misused.

Petitioners also argue (Pet. 18) that requiring disclosure of client names to the LSC Inspector General violates the doctrine of unconstitutional conditions be-

cause it requires indigent clients to relinquish their right to confer with their attorneys free from unreasonable government interference. As explained above, however, petitioners have failed to show that the request for client names in connection with a legitimate investigation of the expenditure of federal funds by a grantee has any adverse impact on the ability of legal services clients to confer with their attorneys. Moreover, when Congress funds a program, it has broad authority to ensure that those funds are spent in a way that furthers the purposes of that program. *Rust* v. *Sullivan*, 500 U.S. 173 (1991). Section 509(h) falls well within whatever limits there may be to that authority. By authorizing the Inspector General to obtain access to client names, Section 509(h) ensures that the Inspector General can effectively perform his crucial auditing function.

Petitioners also contend (Pet. 18) that requiring disclosure of client names to LSC auditors violates equal protection because it affects only those who are indigent. In making that argument, petitioners ignore the fact that the LSC Inspector General's request affects only indigent clients because the LSC program is limited to furnishing legal services for the indigent. It is well- established, moreover, that indigence is not a suspect status that triggers any heightened equal protection review. *Maher* v. *Roe*, 432 U.S. 464, 471 (1977). And the LSC Inspector General's request for client names plainly satisfies rational basis review.

3. Finally, petitioners contend (Pet. 19-30) that the appointment of the LSC Inspector General by the LSC Board of Directors, see 5 U.S.C. App. 8G(c), violates the Appointments Clause of the Constitution. But petitioners did not raise that issue in either the district court or the court of appeals. Accordingly, neither

court addressed that issue. Because the Appointments Clause issue was neither pressed nor passed upon below, it is not properly presented here. See *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider issue "raised for the first time in the petition for certiorari").

In any event, petitioners' Appointments Clause challenge lacks merit. The Appointments Clause requires that the President nominate and, with the advice and consent of the Senate, appoint principal officers of the United States. U.S. Const. Art. II, § 2, Cl. 2. The Appointments Clause also provides, however, that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Ibid.* Because the LSC Inspector General is an "inferior Officer," and the LSC Board of Directors is a "Head[] of Department[]," Congress had authority under the Appointments Clause to assign to the LSC Board of Directors the power to appoint the LSC Inspector General.

Petitioners err in contending (Pet. 25-28) that the Inspector General is a principal officer, rather than an inferior officer. Under *Edmond* v. *United States*, 520 U.S. 651, 663 (1997), an officer is an "inferior officer" within the meaning of the Appointments Clause if he "is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." The Inspector General qualifies as an inferior officer under that standard because Congress has expressly provided that the "Inspector General shall report to and be under the general supervision of" the LSC Board of Directors, 5 U.S.C. App. 3, and because the members of the Board

are appointed by the President with the advice and consent of the Senate, 42 U.S.C. 2996c(a).

Petitioners' contention (Pet.28-30) that the Board of Directors is not a "Head of Department" is similarly without merit. Because Board members are appointed by the President with the advice and consent of the Senate, and because they have no "relationship with some higher ranking officer or officers below the President," *Edmond*, 520 U.S. at 662, the Board is a "Head of Department" for purposes of the Appointments Clause.

Relying on *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), petitioners contend (Pet. 29-30) that the Board is not a "Head of Department" within the meaning of the Appointments Clause because LSC is not like the cabinet-level departments. Petitioners' reliance on *Freytag* is misplaced. That case reaffirmed that the term "Heads of Departments" in Article II, Section 2, Clause 2, does not embrace "inferior commissioners and bureau officers," 501 U.S. at 886 (quoting *United States* v. *Germaine*, 99 U.S. 508, 511 (1879)). The Court did not address, however, whether the heads of "principal agencies"—in which the Court included entities such as the Federal Trade Commission, the Central Intelligence Agency, and the Federal Reserve Bank of St. Louis—may appoint inferior officers. *Id.* at 887 n.4. *Freytag* is therefore inapposite here.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

BRONX LEGAL SERVICES
and QUEENS LEGAL SERVICES,

Petitioners,

v.

LEGAL SERVICES CORPORATION
LEGAL SERVICES FOR NEW YORK CITY, and
LEONARD KOCZUR, Acting Inspector General
of the Legal Services Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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REPLY TO THE GOVERNMENT'S STATEMENT OF THE QUESTIONS PRESENTED

The government states that the first question presented by this Petition is "[w]hether petitioners' *contracts* with LSNY require petitioners to furnish *client names*." Gov't Br. at (i) (emphasis added). This is an incorrect statement of the issue presented for two separate reasons. *First*, Petitioners never objected to providing LSNY and the IG-LSC with *client names*. What they objected to, and what the courts below ruled they were required to reveal, was *client secrets*. *Second*, the basis for the decision of the courts below was not that disclosure of client secrets was required by contract, but that it was required *by law* (Section 509(h) of the 1996 Omnibus Appropriations Act). If the sole basis for requiring disclosure of the information at issue had been the contracts, then summary judgment would have been inappropriate because Petitioners had alleged other factual and legal grounds that would have precluded summary judgment on the contract claim. The only valid basis on which the judgment below can be explained (as is clear from the memorandum decision of the district court) is that the disclosure at issue was required by law.

REPLY TO RESPONDENTS' STATEMENTS OF THE CASE

1. LSC asserts that "[t]his case is about Petitioners' refusal to provide information required by a valid administrative subpoena." LSC Br. at 1. That is incorrect. At no time were Petitioners ever served with a subpoena. On March 22, 2000, the IG-LSC served an administrative subpoena on Respondent LSNY; however, neither that subpoena, nor any other subpoena, was ever served on Petitioners, nor were Petitioners ever joined as parties to the subpoena enforcement proceeding that was brought against LSNY in the District of Columbia. Furthermore, after Petitioners commenced the present proceeding in the

Southern District of New York, the IG-LSC specially moved in the D.C. proceeding for "clarification" that the enforcement order that had been entered against LSNY in the D.C. proceeding applied to Petitioners as well. The D.C. court promptly and squarely denied this motion, stating the government's "motion for clarification is denied. The subpoena requires *LSNY* to produce documents in *its* possession, custody or control" (emphasis added). Contrary to LSC's assertion, therefore, this case is not about refusal to provide information required by an administrative subpoena.

2. The government states that "the Inspector General constructed a 'Chinese wall' separating the client names from the problem codes so that it would not be possible to link a particular client to the subject matter of the representation." Gov't Br. at 4 (citing *United States* v. *LSNY*, 249 F.3d 1077, 1080 (the subpoena enforcement proceeding against LSNY)). The possible use and effect of this procedure, however, was never litigated in the present proceeding and was not in any way relied upon as a basis for the decision here. Moreover, if given the opportunity, Petitioners would have contended that this procedure was both inappropriate and inefficacious.

3. The decision of the D.C. courts in the subpoena enforcement proceeding brought against LSNY (*see* Gov't Br. at 4-5) is not relevant here. The only issue decided in that proceeding was whether the subpoena issued to LSNY should be enforced, not whether LSNY had an obligation to disclose client secrets apart from the subpoena. In contrast to what happened to LSNY, no subpoena was ever issued to Petitioners. This is significant because compliance with a valid subpoena is one of the exceptions under the disciplinary rules that would have permitted Petitioners to disclose the client secrets at issue.

ARGUMENT

I. Section 509(h) Does Not Require Petitioners To Make The Disclosures At Issue Here

A. Section 509(h) Requires Disclosure of Client Names, Not Client Secrets

The government and LSC argue (and the courts below held) that Petitioners are required to disclose the *client secrets* at issue here because Section 509(h) of the 1996 Omnibus Appropriations Act requires that "financial records, time records, retainer agreements, client trust funds and eligibility records, *and client names* . . . be made available to any auditor or monitor of the recipient" (emphasis added). As explained in the Petition, however, Section 509(h) merely requires recipients of LSC funds to disclose client names, *not client secrets*.[1] In contrast, Section 2996(e)(3) of the LSC Act explicitly provides in clear and unequivocal language that "the Corporation [LSC] *shall not*, under any provision of this subchapter, ***interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility*** . . ." 42 U.S.C. § 2996e(3) (emphasis added). Since New York's disciplinary rules (as well as the ethical rules of most other states) prohibit attorneys from disclosing client secrets except under limited circumstances, there was no valid reason for the courts below to have interpreted Section 509(h) as requiring disclosure of client secrets.

The fallacy made by the courts below is vividly demonstrated by the government's own recitation of the basis for the decision. Thus, the government states, "[t]he court held

---

1. As noted above, Petitioners never objected to providing LSNY and the IG-LSC with client names. What they objected to was providing client names together with the associated problem codes which revealed the subject matter of the representation.

that even assuming that client names constitute 'client secrets' under New York disciplinary rules, those rules permit a lawyer to reveal *client secrets* when 'required by law or court order.'" Gov't Br. at 5.-6. The government then continues, "[b]ecause Section 509(h) requires disclosure of the *client names*, the court concluded such disclosures are "required by law." *Id.* at 5. This is a non-sequitor. The fact that Section 509(h) requires disclosure of *client names* does not signify that it also requires disclosure of *client secrets*.

B. It Was Unreasonable To Interpret Section 509(h) As Requiring Disclosure of Client Secrets

Even if it is assumed that Section 2996(e)(3) and Section 509(h) are deemed to be inconsistent, it was unreasonable for the courts below to conclude that Congress intended to change the substantive law of the LSC Act when it enacted the 1996 Appropriations Act. As explained in the Petition, it is well established that repeals by implication are not favored and this is especially true when the provision advanced as the repealing measure was enacted in an appropriations bill.

Accordingly, the conclusion reached by the courts below that Section 509(h) of the 1996 Appropriations Act requires recipients of federal LSC funds to disclose *client secrets* (as opposed to *client names*) is clearly erroneous and should be reversed.

II. As Interpreted And Applied By The Courts Below, Section 509(h) Of The 1996 Appropriations Act Is Unconstitutional

A. The Constitutional Challenges To Section 509(h) Are Properly Before This Court

The government states that "Petitioners do not contend that the court of appeals erred in failing to decide the constitutional challenges." Gov't Br. at 9. This is not correct. The basis for both the district court's decision and the circuit court's affirmance of that decision was that disclosure of the client secrets at issue was "required by law." Although the circuit court went on to indicate in its opinion "there are no genuine issues of fact concerning [petitioners'] duties under the contract" (App. A 4a), and therefore "we . . . need not consider . . . plaintiffs' constitutional claims" (*Id.*), this was erroneous. Petitioners had, in fact, raised factual issues concerning their duties under the contract. The district court did not reach these issues because it concluded that the disclosure at issue was required by law. If, as petitioners claimed, Section 509(h) was found to be unconstitutional, then there would have been a factual dispute as to whether Petitioners were obligated to make the disclosures under the contract. It was essential, therefore, for the court of appeals to rule on the constitutional issues.

B. The Separation of Powers Issue

The government argues that the "separation of powers" doctrine is not applicable here because that doctrine only applies to separate branches of the federal government, whereas the conflict here is between *federal* statutory law (Section 509(h) of the Omnibus Appropriation Act) and *state* judicial power (regulation of attorneys). This is not a valid distinction, however, because state disciplinary rules and professional qualifications apply equally to attorneys who practice in both state and federal

courts. In invoking the separation of powers principle in *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 545-46 (2001) (which also involved a legal challenge under the LSC Act), this Court did not limit application of the doctrine to attorneys practicing in federal court.[2] Furthermore, the LSC Act itself explicitly provides that it was not intended to "abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such profession." 42 U.S.C. § 2996(e)(3).

The government and LSC also argue that Section 509(h) does not intrude into the attorney-client relationship because the "Disciplinary Rules expressly permit attorneys to reveal 'client secrets' when 'required by law or court order.'" Gov't Br. at 9; *see also* LSC Brief at 4. As explained in the Petition, however, this is circular, tautological reasoning that is both illogical and invalid. It is illogical to say that all attorneys have an ethical obligation to preserve client secrets and then say that it is permissible for LSC-funded attorneys (and only LSC-funded attorneys) to disclose clients' secrets because Congress says they may do so. In effect, Congress would be saying that an ethical obligation that applies to all attorneys generally does not apply to attorneys who receive LSC funds. This clearly creates two classes of attorneys and unduly infringes on the prerogative of the judiciary to regulate attorneys.

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2. LSC attempts to distinguish *Velazquez* on the ground that it concerned "Congress' ability to impose viewpoint-based limits on the arguments a lawyer could make on behalf of a client" (LSC Br. at 4). This is a distinction without a difference. *Valazquez* is relevant here because the Court ruled in that case that Congressional restrictions on attorneys pursuant to the LSC Act may violate the separation of powers principle.

C. The First Amendment Issue

Respondents argue that requiring attorneys who receive LSC funds to disclose their clients' secrets does not run afoul of the First Amendment because "when the government funds the furnishing of services, it is entitled to ascertain the recipients of those services." Gov't Br. at 10; *see also* LSC Br. at 5. Even if this is so, it does not justify requiring disclosure of client secrets. Moreover, the government's request for information in the present case was far more extensive and intrusive than was reasonable or necessary. To justify such an encroachment, case law requires that there be a clearly demonstrated and compelling state need. *See Baird* v. *State Bar of Arizona*, 401 U.S. 1, 6 (1971). No such showing was made here. Indeed, Petitioners submitted substantial evidence in opposition to the motion for summary judgment which established that the request at issue was both unnecessary and unreasonable.

D. The Due Process Issue

The government argues that the "doctrine of unconstitutional conditions" is not relevant here because "when Congress funds a program it has broad authority to ensure that those funds are spent in a way that furthers the purposes of that program." Gov't Br. at 11 (citing *Rust* v. *Sullivan*, 500 U.S. 173 (1991). In making this argument, the government simply ignores the problem. Obviously, Congress has broad authority to ensure that funds are spent in a way that furthers the purposes of that program. What Congress may not do, however, is condition the receipt of such funds on waiver of a constitutional right. For the reasons explained in the Petition, legal service clients have a constitutional right of association under the First Amendment to consult with an attorney without unreasonable government interference. Petitioners submitted substantial proof in opposition to the motion for summary judgment which showed that the interference here (disclosure of client secrets)

was both unnecessary and unreasonable, thus implicating the doctrine of unconstitutional conditions.

E. The Equal Protection Issue

Finally, the government and LSC assert that Plaintiffs' equal protection argument fails because "indigence is not a suspect status that triggers any heightened equal protection review." Gov't Br. at 11; LSC Br. at 6. In making this argument, however, Respondents ignore the particular grounds stated in the Petition as to why the Equal Protection clause is violated here.

III. Section 104 Of The Inspector General Act Amendments Of 1988 Is Unconstitutional

A. The "Appointments Clause Issue" Is Properly Before This Court

The government argues that "petitioners did not raise [the Appointments Clause] issue in either the district court or the court of appeals." Gov't Br. at 12. This is not accurate. Petitioners consistently argued in both the district court and in the court of appeals that Section 104 of the Inspector General Act Amendments of 1988 was unconstitutional because it impermissibly delegated the government's subpoena powers to the IG-LSC. Petitioners initially argued that the delegation was improper because the IG-LSC was a private individual appointed by a private corporation (LSC). In response, the government argued that the IG-LSC is not a private citizen, but an officer of the United States. *See* IG-LSC Second Circuit Brief at 54. Petitioners then pointed out that

> unlike the inspector generals of federal agencies, who are appointed by the President by and with the advice of the Senate (see 5 U.S.C. App. 3 § 3), the inspector general of LSC is appointed by the head of the LSC (see 5 U.S.C. App. 3 § 8G(c) [SPA-87]) and he

> 'reports to' and is 'under the general supervision of' the head of LSC, a private corporation. *Id.* § 8G(d) [SPA-87].

See Petitioners' Second Circuit Reply Brief at 24. Thus, Petitioners directly raised the issue of whether the IG-LSC was properly appointed in accordance with the Appointments Clause.

Furthermore, even if the Appointments Clause issue had not been explicitly raised in the courts below (which it was), that would not prevent this Court from considering the issue. As this Court stated in *Freytag* v. *Commissioner of Internal Revenue*, 501 U.S. 868, 878-79 (1991), in agreeing to hear an Appointments Clause challenge that had not been previously raised in the courts below:

> This Court in the past, however, has exercised its discretion to consider nonjurisdictional claims that had not been raised below [citations omitted]. *Glidden* [*Co.* v. *Zdanok*, 370 U.S. 530, 536-36 (1962)] expressly included Appointments Clause objections to judicial officers in the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below.

B. The IG-LSC Is A "Principal Officer" Of The United States

The government argues that the IG-LSC is not a "principal officer" of the United States under *Edmond* v. *United States*, 520 U.S. 651 (1997) because he "reports to and is under the general supervision of" LSC's Board of Directors (Gov't Br. at 13). This contention is invalid for the reasons explained in the Petition. First, the IG-LSC performs the same functions and exercises the same statutory powers as the IGs of other government agencies, all of whom are principal officers of the

U.S. appointed by the President with the advice and consent of the Senate. Second, contrary to the government's argument, the IG-LSC is not "directed and supervised" within the meaning of *Edmond* by others who were appointed by the President with the advice and consent of the Senate. Indeed, the IG Act explicitly provides that "[t]he head of the designated Federal entity shall *not* prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation." 5 U.S.C. App. 3 § 8G(d) (emphasis added).

C. Even If The IG-LSC Is Deemed To Be An "Inferior Officer" Of The U.S., His Appointment By LSC's Board of Directors Was Still Constitutionally Invalid

Even assuming for purposes of argument that the IG-LSC is an "inferior officer" of the United States, his appointment by LSC's Board of Directors was still contrary to the Appointments Clause since that Board is not a "Head of Department" within the meaning of Article II, § 2, Cl. 2. *Freytag*, 501 U.S. at 886 (holding that the term of "Head of Department" as used in the Appointments Clause must be confined "to executive divisions like the Cabinet-level departments"). The government's argument that the reasoning of *Freytag* does not apply to LSC is completely unfounded. The explicit constitutional limitations imposed by the Appointments Clause apply to all government entities. *Cf. Lebron* v. *National Railroad Passenger Corp.*, 523 U.S. 374 (1995).

CONCLUSION

Petitioners respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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